Case of Barney

Filed Jan 10. 1879

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~460.~~ 192

ASHBEL H. BARNEY, JESSE HOYT, A. M. HOYT, S. N. HOYT, ANGUS SMITH, ET AL., APPELLANTS,

vs.

WILLIAM H. AND EDWARD P. LATHAM.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 9, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 466.

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vs.

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INDEX.

	Original.	Print.
Summons	1	1
Affidavit for publication	3	2
Affidavit for attachment	10	4
Bond in attachment	13	6
Complaint	16	7
Answer of A. H. Barney	38	15
Answer of Jesse Hoyt, A. M. Hoyt, S. N. Hoyt, Angus Smith, W. G. Fargo, B. P. Cheney, N. C. Barney, and C. T. Barney	67	26
Answer of Winona and St. Peter Land Co	95	36
Petition for removal to United States circuit court	98	37
Bond for removal to United States circuit court	104	39
Order for removal to United States circuit court	109	41
Clerk's certificate	110	42
Motion to remand	111	42
Order remanding cause	113	43
Opinion	114	43
Appeal	118	44
Bond	132	50
Stipulation	135	51
Citation	138	52
Clerk's certificate	140	53

1 *Summons.*

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca, ss:

WILLIAM H. LATHAM AND EDWARD P. Latham, plaintiffs,
against
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and The Winona and Saint Peter Land Company, defendants.

The State of Minnesota to the above-named defendants:

You and each of you are hereby summoned and required to answer the complaint in the above-entitled action, which has been filed in the office of the clerk of said court in the village of Waseca, and to serve a copy of your answer to said complaint on the subscriber at his office in the village of Waseca, in the county of Waseca and State aforesaid, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply
2 to the court for the relief demanded in the said complaint, and the costs and disbursements of this action.

Dated December 4th, A. D. 1876.

M. D. L. COLLISTER,
Plaintiffs' Attorney, Waseca, Minnesota.

GORDON E. COLE,
Of Counsel, Faribault, Minnesota.

STATE OF MINNESOTA,
County of Waseca, ss:

I hereby certify and return that I have made dilligent search and inquiry and that none of the within-named defendants are to be found in this said county of Waseca.

Dated Dec. 8th, 1876.

S. W. LONG,
Sheriff of Waseca County.

Fees, $1.00.

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca:

WILLIAM H. LATHAM AND EDWARD P. Latham, pl'ffs,
against
ASHBEL H. BARNEY ET AL.
} Summons.

Original, filed Dec. 5, 1876.

JAMES HAYDEN, *Clerk.*

M. D. L. COLLISTER,
Att'y for Pl'ffs, Waseca, Minnesota.
GORDON E. COLE,
Of Counsel, Faribault, Minnesota.

REC. 466—1

3 *Affidavit for publication of summons.*

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca:

WILLIAM H. LATHAM AND EDWARD P. LATHAM, plaintiffs,
against
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, SAMUEL N. HOYT, ANGUS SMITH, WILLIAM G. FARGO, BENJAMIN P. CHENEY, M. C. BARNEY, CHARLES F. BARNEY, and the WINONA and ST. PETER LAND COMPANY, defendants.

Edward P. Latham, being duly sworn, says that he is one of the plaintiffs in this action and the agent of his co-plaintiff in the conduct of this action; that he believes that the defendants, Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles F. Barney, are not residents of this State and cannot be found therein.

That he has deposited copies of the summons herein in the post-office, directed to all of said defendants at their several places of residence.

4 That the said defendants are not residents of this State, but have property therein; that the claim of the plaintiff arises of a certain contract of copartnership between the plaintiff's ancestor, Charles F. Barney, whose heirs they are, and the said defendants, whereby he became entitled to one 1-37th of all the interest acquired by him and said defendants jointly, under and by virtue of a certain other contract by all of said associates with the Winona and St. Peter Railroad Company, and to all rights under which, to the extent of 2-9th thereof, these plaintiffs claimed to have succeeded, and seek in this action to enforce their title to said share of the property which became vested in said associates under said contract and which the defendants refused to perform, and claim title in all the said property in themselves.

That this court has jurisdiction of the subject-matter of this action; that the subject of this action is in part real and personal property in this State, and said defendants have or claim an interest in said personal property, and the relief demanded consists in part in excluding the said defendants from any interest in this 2-9th of 1-37th part of certain other property in controversy herein.

EDWARD P. LATHAM.

5 Subscribed and sworn to before me this 6th day of December, 1876.

[SEAL.] M. D. L. COLLESTER,
Notary Public.

(Indorsed:) District court, Waseca County. William H. Latham et al. vs. Ashbel H. Barney et al. Affidavit for publication of summons. Filed Dec. 6th, 1876. Jas. Hayden, clerk,

6 *Affidavit of publication.*

STATE OF MINNESOTA,
Waseca County:

T. F. Hollister, of said county, being duly sworn, deposes and says

that he is the printer and publisher of the Waseca Leader, a publi newspaper printed and published at Waseca, in the county of Waseca and that the annexed printed notice was inserted and published in said newspaper seven weeks successively, at least once in each week, and the first publication was on the 16th day of December, 1876, and the last publication on the 20th day of January, 1877.

T. F. HOLLISTER.

Subscribed and sworn to before me this 12th day of February, 1877
[NOTARIAL SEAL.] M. D. L. COLLISTER,
Notary Public.

Printer's fees, $7.87.

Filed in the clerk's office February 13th, 1877.
JAMES HAYDEN, *Clerk.*

7 *Summons.*

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca, ss :

WILLIAM H. LATHAM AND EDWARD P. LA-tham, plaintiffs,
against
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and The Winona and St. Peter Land Company, defendants.

The State of Minnesota to the above named defendants:

You and each of you are hereby summoned and required to answer the complaint in the above entitled action, which has been filed in the office of the clerk of said court, in the village of Waseca, and to serve a copy of your answer to said complaint on the subscriber, at his office, in the village of Waseca, in the county of Waseca and State of Minnesota, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the
8 said complaint within the time aforesaid, the plaintiffs in this action will apply to the court for the relief demanded in said complaint and the costs and disbursements of this action.

Dated Dec. 4th, A. D. 1876.

M. D. L. COLLISTER,
Plaintiffs' Attorney, Waseca, Minnesota.

GORDON E. COLE,
Of Counsel, Faribault, Minnesota.

STATE OF MINNESOTA,
County of Winona, ss :

I hereby certify and return that on the 5th day of December, A. D. 1876, at the city and county of Winona, State of Minnesota, I served the within summons upon the defendant within named, by delivering to and leaving with H. W. Lamberton personally (the general manager of the said within defendant) a true and correct copy thereof.

WM. H. DILL,
Sheriff of Winona Co., Minnesota.

Fees, $1.50.

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca:

WILLIAM H. LATHAM AND EDWARD P. LATHAM
against
ASHBEL H. BARNEY ET AL.
} Summons.

Original filed March 15th, 1877.

JAMES HAYDEN, *Clerk.*

M. D. L. COLLISTER,
Plaintiffs' Attorney, Waseca, Minnesota.
GORDON E. COLE,
Of Counsel, Faribault, Minnesota.

Affidavit for attachment.

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca:

WILLIAM H. LATHAM AND EDWARD P. LATHAM, plaintiffs,
against
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, Samuel N. Hoyt, August Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and The Winona and St. Peter Land Company, defendants.

STATE OF MINNESOTA,
County of Waseca, ss:

Edward P. Latham came before me personally, and being first duly sworn, doth say that he is one of the said plaintiffs in the above entitled action, which is brought for the recovery of money, and a summons has been issued therein; that a cause of action exists against the defendant and in favor of said plaintiff therein, and the amount of said
11 plaintiff's claim therein is at least three thousand dollars, and ground thereof is as follows; that is to say: That the plaintiffs are heirs of Charles H. Latham, deceased; that said Latham in his lifetime was the owner in common with defendants, Ashbel H. Barney, Jesse Hoyt, Alfred M. Barney, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Danford N. Barney, deceased, to whose interest defendant N. C. Barney has succeeded, of a large land grant, consisting of over 600,000 acres of lands in this State. That since his death the defendants have deeded large quantities of said lands to be sold by the Winona and St. Peter Railroad Company, in whose name the legal title to said land stood in trust for said defendants and these plaintiffs, and have appropriated the whole of the proceeds thereof and distributed the same among themselves and excluded the plaintiffs from all interest therein; that the plaintiffs' share of said proceeds is $\frac{2}{9}$ of $\frac{1}{317}$, amounting, according to the best knowledge and belief and information of the plaintiffs, to about thirty-five hundred dollars, which, although

demanded, said defendants refuse to pay over to these plaintiffs, and plaintiffs in this action seek an accounting and a decree of judgment that defendants pay over to them such sum, or so much thereof as shall be found due upon such accounting; and that said defendants Ashbel
12 H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney, are not, nor are any of them, residents of this State. And said affiant doth depose and say that said plaintiff is in danger of loosing his said claim by reason of the facts aforesaid, unless a writ of attachment issue, and prays that such writ of attachment may be allowed and issued against the property of said defendant therein, according to the statute in such case provided. And said affiant says that no previous application has been made therein for such order, and further saith not.

EDWARD P. LATHAM.

Subscribed and sworn to before me on this 4th day of December, A. D. 1876.

[SEAL.] M. D. L. COLLESTER,
Notary Public.

(Indorsed:) District court 5th judicial district, county of Waseca. William H. Latham et al. against Ashbel H. Barney et al. Affidavit for attachment.

To the clerk of said court:

On filing the within affidavit and bond approved by me, in the within entitled cause, let a writ of attachment issue as within prayed.

Dated Nov. 5th, 1876.

J. B. SMITH,
Court Commissioner.

Filed Dec. 5th, 1876.

JAMES HOYDEN, *Clerk.*

M. D. L. Collester, pl'ff's attorney.
Gordon E. Cole, of counsel, Fairbault, Minn.

13 *Bond in attachment.*

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca;

WILLIAM P. LATHAM AND EDWARD P. LATHAM
against
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and The Winona and St. Peter Land Company.

Know all men by these presents that we, Edward P. Latham, principal, and Samuel B. Williams and Nathaniel Garland, sureties, all of said county, are held and firmly bound unto Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney, defendants in the above entitled action, in the sum of two hundred & fifty dollars,

lawful money of the United States, to be paid unto the said defendants, their heirs, executors, administrators, or assigns, for which payment, well and truly to be made, we jointly and severally bind ourselves,
14 our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 4th of December, A. D. 1876.

The condition of this obligation is such, that whereas the above-named plaintiffs have applied to the proper officer for a writ of attachment against the property of said defendants named in the body of this bond, defendants in said action, and has filed an affidavit pursuant to the statute in such case provided:

Now, therefore, if the said plaintiffs shall pay all costs that may be awarded to said defendant' (if they recover judgment in said action), and all the damages which they may sustain by reason of the attachment, not exceeding the sum of two hundred and fifty dollars, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals on this 4th day of December, A. D. 1876.

EDWARD P. LATHAM. [SEAL.]
S. B. WILLIAMS. [SEAL.]
NATHANIEL GARLAND. [SEAL.]

Signed, sealed, and delivered in presence of—
B. S. LEWIS.
H. P. NORTON.

STATE OF MINNESOTA,
County of Waseca, ss:

Be it known that on this 4th day of December, A. D. 1876, came before me personally Edward P. Latham, S. B. Williams, and Na-
15 thaniel Garland, to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

[SEAL.] B. S. LEWIS,
Notary Public.

STATE OF MINNESOTA,
County of Waseca, ss:

Samuel B. Williams and Nathaniel Garland, upon oath doth say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of and in the State of Minnesota, and worth the amount of two hundred & fifty dollars specified in the foregoing bond above his debts and liabilities, and exclusive of his property which is exempt from execution.

S. B. WILLIAMS.
NATH'L GARLAND.

Subscribed & sworn to before me on this 4th day of December, A. D. 1876.

[SEAL.] R. S. LEWIS,
Notary Public.

(Indorsed:) District court, county of Waseca. William H. Latham et al. vs. Ashbel H. Barney et al. Bond in attachment.

I hereby approve the within bond & the sureties thereon. Dated Nov. 5th, 1876.

J. B. SMITH,
Court Commissioner.

Filed Dec. 5th, 1876.

JAS. HAYDEN, *Clerk.*

M. D. L. Collister, plaintiffs' attorney, Waseca, Minnesota.

16 *Complaint.*

District court, fifth judicial district.

STATE OF MINNESOTA,
Waseca County:

WILLIAM H. LATHAM AND EDWARD P. LATHAM
vs.
ASHBEL H. BARNEY, JESSE HOYT, SAMUEL N. Hoyt, Alfred M. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and The Winona and St. Peter Land Company, defendants.

For complaint in this action the plaintiffs respectfully show to this court:

That the defendant, the Winona and St. Peter Land Company, is a corporation duly incorporated under the laws of this State; that all of the lands hereinafter described are situated in this State, and a considerable portion of the lands still unsold are situate in said county of Waseca.

That by an act of Congress of the United States approved March 3rd, 1857, entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad
17 in said State," there was granted to the said Territory for the purpose of aiding in the construction of a railroad from Winona via Saint Peter to a point on the Big Sioux River south of the forty-fifth parellel of north latitude, every alternate section of land designated by odd numbers, forty-six sections in width on each side of said road, but in case it should appear that the United States had, when the lines or routes of said road should be definitely fixed, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption had attached to the same, then it should be lawful for any agent or agents to be appointed by the governor of said Territory of future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the lines of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid, which land thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections designated by odd numbers as aforesaid, and appropriated as aforesaid, shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid, provided that the lands so located should in no case be further than fifteen miles from the line of said road.

18 That by an act of Congress of the United States, approved March 3d, 1865, entitled "An act extending the time for the completion of certain railroads in the State of Minnesota and Iowa, and for other purposes; said grant was increased to ten sections per mile, provided that the land to be located pursuant thereto should in no case be further than twenty miles from the line of said road.

That by an act of the legislature of the State of Minnesota approved March 10th, 1862, entitled an "Act to facilitate the construction of a

railroad from Winona westerly by way of Saint Peter," said grant was duly transferred to the Winona and Saint Peter Railroad Company, a corporation duly incorporated by and under the laws of the State of Minnesota, which was authorized and empowered to construct and operate said line of railroad.

That in and by said last-named act it was provided that whenever any ten miles of said road should be completed, with the running of regular trains of cars on the same, it should be the duty of the governor to certify the same to the Secretary of the Interior, and thereupon and not before said company may demand and shall be entitled to receive from the governor, acting for and in the name of the and for the State, a deed in fee simple for one hundred and twenty sections of land which by the act of Congress is authorized to be sold after the location and before the completion of twenty miles of road, and whenever twenty continuous miles of road shall be completed, with regular trains of cars running, the governor shall certify the same to the Secretary of the Interior, and thereupon it shall be the duty of the governor to execute to said company a deed in fee simple to a further quantity of one hundred and twenty sections of land, and in like manner and whenever as often as a further distance of twenty miles shall be so completed the governor shall certify the same to the Secretary of the Interior, and in like manner convey to said company another quantity of one hundred and twenty sections of land.

That in and by the act of Congress last hereinbefore referred to it was provided that the land hereby and heretofore granted to said Territory or State of Minnesota shall be disposed of by said State for the purpose aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, and the said Secretary shall be satisfied that the State has complied in good faith with this requirement, the said Secretary of the Interior shall issue to said State patents of all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situate opposite to and within a limit of twenty miles of the line of said section of railroad thus completed, extending along the whole length of said completed sections, and no further, and so on from time to time until said road shall be completed; provided, that nothing therein contained should interfere with any existing rights acquired under any acts of Congress making grants of land to the State of Minnesota to aid in the construction of railroads.

That in and by an act of the Congress of the United States approved July 18th, 1866, entitled "An act relating to lands granted to the State of Minnesota to aid in the construction of railroads," it was provided that whenever it should appear that the United States had sold or disposed of any lands granted to the Territory or State of Minnesota for the purpose of aiding in the construction of railroads after the definite location of the line of road, and before the withdrawal of the said lands from sale at the proper local land office, said State may, by its agent, select, in lieu of the lands so sold or disposed of, from any of the lands of the United States subject to sale, being odd-numbered sections within twenty miles of the line of the proper road, a quantity of land equal to that so sold or disposed of, and the lands so selected shall be substituted for those so sold or disposed of by the United States, and may be disposed of by the State in all respects as if said substituted lands had been part of the original grant to the State, and it was therein

provided that on the completion of any ten miles of road the State may sell one-half the quantity of land which the State is authorized to dispose of on the completion of twenty miles. And it was also provided therein that the lands granted by any act of Congress to the State of Minnesota to aid in the construction of railroads specifically lying in place, or any division of the ten miles of road, shall not be disposed of until the road shall be completed through and coterminous with the same; provided, however, that this provision shall not extend to any lands authorized to be taken to make up deficiencies.

That prior to the thirty-first day of October, one thousand eight hundred and sixty-seven, one hundred and five miles of said railroad had been constructed in all respects in accordance with the requirements of said legislation hereinbefore set out by the defendants, Ashbel H. Barney, Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Samuel N. Hoyt, and Alfred M. Hoyt, and Charles F. Latham, and Danforth N. Barney for the said Winona and Saint Peter Railroad Company, pursuant to a contract between said parties and said company.

That exactly how much of said portion of said road had been so constructed prior to the passage of the act of Congress, approved March 3d, 1866, hereinbefore stated, increasing the grant to said company from six sections per mile to ten sections per mile, these
22 plaintiffs have not sufficient knowledge or information to form a belief, but aver that that portion of said road so constructed extending from Winona westerly to Waseca, in said State, and that by virtue of said construction the said Winona and Saint Peter Railroad Company became and were entitled under said legislation to from six hundred thousand acres to six hundred and seventy-two thousand acres of land, the right to the deed of the last five miles of said portion of road so constructed only being postponed until the said company should complete that section of ten miles, pursuant to the provisions of the act of Congress of July 13th, 1866, hereinbefore stated.

That on this said thirty-first day of October, 1867, an agreement and contract was made and entered into by and between said Ashbel H. Barney, Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Samuel N. Hoyt, and Alfred M. Hoyt, defendants, and Charles F. Latham and Danford N. Barney, parties of the first part, and the said Winona and Saint Peter Railroad Company, party of the second part, wherein it was recited that said parties of the first part had loaned and advanced large sums of money to the party of the second part, and made, constructed and equipped one hundred and five miles of the railroad of said party of the second part in the State of Minnesota. And the
23 said party of the second part is indebted to the said parties of the first part in a large sum of money on account thereof, and that the said parties have agreed upon terms of liquidation, settlement and payment of all such indebtedness, and the adjustment of all matters between them on the terms thereinafter named. And in and by said contract, after providing for a certain part of said indebtedness, the said party of the second part contracted and agreed with the said parties of the first part as follows, to wit: Now for the residue of the said indebtedness of the said parties of the second part, to said parties of the first part, the said party of the second part hath agreed to sell and convey to the said parties of the first part as many acres of land heretofore granted by Congress to the State of Minnesota as the said party of the second part shall recover from said State by reason of the construction of the portion of the Winona and Saint Peter Railroad heretofore constructed, to wit, one hundred and five miles thereof, extending westwardly from

Winona, excepting and reserving nevertheless any and all parts and proceeds of such lands, if any such there be, which may be necessary for the tracts of said railroad or the right of way, or any depot or depot grounds thereof, or any other purpose incidental to the operation of said railroad constructed or to be constructed, or any part thereof, which lands hereinbefore agreed to be sold shall be conveyed to the said
24 parties of the first part, or as they shall in writing direct, whenever and as soon as the said party of the second part shall obtain title thereto under such acts of Congress, the lands to be conveyed as aforesaid to be selected as follows: Beginning at Winona aforesaid, and from thence proceeding on each side of said railroad on a course running parallel therewith, and embracing each of the sixteen, fifteen, and twenty mile limits of the Congressional land grants, and in proceeding taking all lands within each and all of said limits, which shall be received by said company under said acts of Congress, or either of them, it being understood that on each side of the said railroad an uniform line of advance westwardly shall be maintained as nearly as may be until as many acres shall have been selected and taken as the said company shall have received for the construction of the portion of said railroad *west* completed, which is estimated to be one hundred and five miles thereof, extending north'ly and westerly from Winona aforesaid, it being understood that said parties shall receive as many acres as shall be received by the said parties of the second part for the construction of said one hundred and five miles, or so much thereof as is now constructed, notwithstanding that under said act of Congress the said lands are certified only upon completion of sections of not less than ten miles of railroad, but reserving, excepting and deducting from the said num-
25 ber of acres all lands necessary for the track of said railroad; and the said party of the second part agrees to acquire the title of said lands as fast as it may be permitted to do under said act of Congress, and to release and convey to said parties of the first part, or to such person or persons, in such manner, and from time to time as may be devised by the said parties of the first part or their counsel, on the request of the said parties of the first part, or a majority of them, and will do any and every other act and thing necessary and proper to secure the parties of the first part said lands, and every part and parcel thereof, if it shall be hereafter determined that the same shall be sold by the said parties of the second part for the benefit of the said parties of the first, and until the final arrangement shall be made with reference thereto the title shall be held by the said parties of the second part; and as some time is necessary to enable said parties of the first part to confer and agree upon the detail in relation to holding the title and the mode of disposing of said lands, this clause is inserted to express the agreement of the parties in relation thereto; which contract was duly signed and sealed, witnessed and acknowledged, and a copy thereof is hereto attached and made part of this complaint, and marked Exhibit A.

That of the moneys advanced and used in the construction of said one hundred and five miles of railroad and of the loans and advances mentioned in said contract, Charles F. Latham contributed and
26 advanced one thirty-seventh interest in said contract, and of one thirty-seventh of said lands in equity, and upon a conveyance thereof pursuant to said contract to said associates, the title in fee would have vested in him in common with his said associates to an undivided one thirty-seventh of said lands.

That of the lands agreed to be conveyed in and by said contract there were duly vested in the State pursuant to said act of Congress certain

lands which, prior to October, 1870, were duly conveyed by the State of Minnesota to the Winona and St. Peter Railroad Company, to wit, by deed dated October 4th, 1864, one hundred and fifty-three thousand four hundred and seven acres; by deed bearing date February the twelfth, 1867, thirty four thousand six hundred and eighty-two acres; and by deed bearing date September 2d, 1868, one hundred and eighteen thousand and eight hundred and eighty one acres; and by another deed of the same date fifty-seven thousand one hundred and eighty-four acres.

That after October, 1870, and by deed bearing date February 26th, 1872, the said State of Minnesota duly conveyed to the said company a further quantity of the lands agreed to be conveyed to said associates in and by said contract, making an aggregate of six hundred and seventeen thousand five hundred and ten acres of land, all of which the
27 said Winona and Saint Peter Railroad Company took and held under said contract in trust for said associates, and in all of which the said Charles F. Latham had and held a one-thirty-seventh interest. Accurate descriptions of all of the lands embraced by said contract are attached to the complaint, and marked Schedule A.

That by deed bearing date May 30th, 1874, more than five hundred thousand acres of land were conveyed by the State of Minnesota to said company, pursuant to the legislation hereinbefore set out. Such portion of which as are embraced and comprised in the lands agreed to be conveyed in and by said contract, as plaintiffs are informed and believe are attached to the complaint, are included in said schedule.

And plaintiff further shows that up to the end of the year 1869 the said the Winona and Saint Peter Railroad Company sold to various purchasers, in small quantities for actual settlement, about twenty-six thousand acres of said lands, as these plaintiffs are informed and believe, a description of which lands is hereto attached and marked Schedule B.

That these sales were chiefly on long time, and the purchase money payable in five equal annual payments, with interest at the rate of seven per cent. per annum, with a small payment down, and a contract of sale, signed by the company and the purchasers, was held by said company, and constituted the security for final payment.

28 That the average value of said lands is at least seven dollars per acre, and the average sales of said lands from the beginning have, as plaintiffs are informed and believe, were not less than seven dollars per acre.

That in October, one thousand eight hundred and seventy, the said Charles F. Latham died seized and possessed of the equitable title to the undivided one thirty-seventh of said lands, as aforesaid, in common with the defendants, Jesse Hoyt, Ashbel H. Barney, Angus Smith, William G. Fargo, Benjamin P. Cheney, Samuel N. Hoyt, Alfred M. Hoyt, Danforth N. Barney, since deceased, and of a one-thirty-seventh interest in said contracts, leaving these plaintiffs and Henry M. Latham, James K. S. Latham, Lucy Kelly, Mary Baker, Julia A. Murphy, Sarah A. Stockwell, Augustus F. Barney, and the three children of William Latham, a deceased brother, his only heirs at law, said heirs being, with the exception of said children, all the brothers and sisters of said Charles F.

That said Charles F. was at the time of his death a citizen of the State of New York, and that by the laws of that State, as well as of the State of Minnesota, at the time of his death, each of said brothers and sisters inherited one-ninth of the real and personal estate of which said Charles
F. died seized or possessed, and the said children the share of
29 their father.

That all the heirs, except these plaintiffs, have released and

disposed of their interest in said lands and contracts to the defendants, or some of them, as the plaintiffs are informed and believe.

That since the death of the said Charles F., Danforth N. Barney has died, and, as the plaintiffs are informed and believe, the defendant, N. C. Barney, has succeeded to his interest as the son and heir of said Danforth N.

That the defendant Ashbel H. Barney has always been and acted as the agent of the said associates, transacting all their business under the said contract with the said railroad company, receiving from said company all moneys accruing from the sale of land, and distributing them among the associates in proportion to their respective interests.

That upon the death of the said Charles F., his heirs and next of kin, for the purpose of saving the delay and expense incident to legal proceedings, did agree among themselves to make an amicable division of said estate.

That at the death of the said Charles F., the defendant Ashbel H. Barney had in his possession or under his control certain of the assets of the said Charles F., which property he surrendered to said next of kin, and distributed between them pursuant to said agreement. That after said distribution had been made of all the personal estate of
30 said Charles F., so far as the same had come to the knowledge of said heirs, an instrument was prepared by or under the directions of said defendant, Ashbel H. Barney, purporting to be a mutual release of said heirs, the one to the other, of all claims to said estate. That said instrument also contained a clause releasing said defendant, Ashbel H. Barney, from all claims by reason of the assets and property which he had so surrendered and distributed among the heirs, as aforesaid. That to said instrument was appended a schedule containing a description of all the personal property so distributed between said heirs, and among others was the following clause, to wit, interest in W. and St. P. land sales, say $10,000. That originals of said instrument, one for each of said heirs and one for said Barney, were sent by said defendants to each of said heirs for signature.

That plaintiffs are ignorant of the nature, extent, or situation of the interest of the said Charles F. under said contract, but supposing that the said clause and release was intended to cover a sum of money actually in the hands of said Barney, accruing prior to payments on contracts for land actually sold the plaintiffs, signed the same without hesitation.

And plaintiffs aver that the value of the interest of said heirs,
31 at the time of the execution of said contract in said lands and contracts exceeded one hundred thousand dollars. A copy of said instrument is hereto attached and made a part of this complaint, and marked Exhibit B.

And plaintiffs further aver that for the purpose of obtaining the interest of said heirs in said contracts and lands for a merely nominal consideration, the defendant, Ashbel H. Barney, fraudulently concealed and withheld from said heirs all knowledge of the value of said property, and fraudulently caused the said clause to be inserted in said agreement, intending to make a fraudulent use of the same to obtain control of said interest as aforesaid.

Plaintiffs further aver that from and after the obtaining of said release the defendant Charles F. Barney, who is the son of the defendant Ashbel H. Barney, has been treated by said associates as one of their number, and has, with the concurrence of the said associates, to wit, the defendants Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Augus

Smith, Samuel N. Hoyt, William G. Fargo, Benjamin P. Cheney, and N. C. Barney, assumed to act as such, and said defendants claiming that said release operated to divest the plaintiffs of all their interest as heirs of said Charles F. in said lands and contracts, have ever since refused, and still do refuse, to permit the plaintiffs to share in the manage-
32 ment of the proceeds of said lands or contracts. And plaintiffs aver that they have never parted with their interest in said lands or contracts.

That said release did not, in spirit or in letter, embrace said property, and was not intended to do so by these plaintiffs.

That they have, before the commencement of this action, offered to return all of said shares of said payment of ten thousand dollars which was received by them, and which was not the proceeds of actual sales in the hands of said associates, and properly distributed to them, and have demanded of said Ashbel H. an account showing what amount was properly due them at the time of said payment, which he and said defendants have always refused and neglected to render.

That, as plaintiffs are informed and believe, about eighty-four thousand dollars have been paid by purchasers of lands, contracts made prior to the death of said Charles F., since his decease, to the defendant Ashbel H., and by him distributed among the associates, the defendants hereinbefore named, no part whereof has been paid or distributed to these plaintiffs, or either of them, unless some part thereof was included in said sum of ten thousand dollars.

That since the death of said Charles F. about sixty thousand acres of said lands have been sold for the benefit of the said associates, and for the aggregate sum of about five hundred thousand dollars, to citi-
33 zens and residents of this State, the proceeds of which have been paid and distributed or passed under the control of said defendants, associates as aforesaid, a portion of the purchase money remaining secured by contracts, which are in the hands of H. W. Lamberton, the land commissioner of said parties, at Winona, in this State. That of these sums the share of these plaintiffs is about thirty-four hundred dollars. That the plaintiffs have repeatedly, prior to the commencement of this action, applied to the said defendants and demanded that their rights be recognized, and their share of said proceeds be distributed to them, but said defendants have always refused, and still continue to refuse to do so, or to recognize any rights whatever in the plaintiffs in regard to said property.

That the foregoing statement of sales and sums received are not made from personal knowledge, but from the best data the plaintiffs have been able to obtain, and are, as the plaintiffs believe, closely approximate estimates. A description of the land so sold since beginning of the year of the death of the said Charles F., and prior to the commencement of the present year, is hereto attached and marked Schedule C.

And plaintiffs further aver that a quantity of said lands, amounting to not less than five hundred and twenty thousand acres, still remain unsold; that the same are of great value, to wit, of about ten dollars per acre.

34 And plaintiffs further that the said Winona and Saint Peter Railroad Company continued to hold all of said lands so granted as aforesaid, and embraced in said contract, in trust for the defendants, Ashbel H. Barney, N. C. Barney, Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Samuel N. Hoyt, and Alfred M. Hoyt, and these plaintiffs, and to sell and dispose of the same, and account and pay over the proceeds thereof to the said defendants, until early in

the present year, when, without the knowledge or consent of these plaintiffs, and without admitting them or either of them as corporators, the defendants, Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles F. Barney, incorporated themselves under the general laws of this State, for the purpose of enabling them the more conveniently to hold and convey said lands under the name and style of the Winona and Saint Peter Land Company, which is the defendant by that name.

That upon perfecting the organization of said company, the majority of the said defendants, as required by the contract hereinbefore set out, directed the said Winona and Saint Peter Railroad Company to convey all of said lands remaining unsold, being the lands described in schedule D, hereto attached, so far as the plaintiffs have been able to ascertain the same, and made a part of this complaint, to the defend-
35 ant The Winona and Saint Peter Land Company; and said conveyance, as these plaintiffs are informed and believe, was accordingly made, and said lands and the legal title thereto vested in said last-named defendants early in the present year.

That since the formation of the said company the defendant Asahel H. Barney has continued to be the active business manager of their affairs, and during all of said time has been the president of said defendant's corporation.

That since the deed to the said corporation, the plaintiffs are informed and believe that a considerable quantity of lands has been sold at prices averaging about ten dollars per acre, but have no knowledge or information sufficient to form a belief as to the quantity or description of lands so sold.

That since said incorporation, the plaintiffs have repeatedly applied to its said president for a transfer of their interest in said property, but have always been put off by him by specious and frivolous excuses, or their demands have been met by him by offers of different interests from those to which they were entitled by law, coupled with various burthens and accompanied by untrue and exaggerated statements as to the small value of the lands and the great expenses and risk attending the management of the grant.

36 That plaintiffs believe that said offers and pretenses were not made in good faith, but were for the purpose of amusing the plaintiffs and inducing them to neglect to assert their rights in the courts until it should be too late.

That the defendant corporation took whatever interest they held in trust for these plaintiffs to the extent of their interest as aforesaid, and with full notice of their rights in the premises, and without any consideration paid therefor. Wherefore the plaintiffs pray the judgment of this court that the defendants, Ashbel H. Barney, N. C. Barney, Jesse Hoyt, Samuel N. Hoyt, Alfred M. Hoyt, William G. Fargo, Benjamin P. Cheney, and Charles T. Barney may be required to account with the plaintiffs for the amount of all moneys which have come into their hands, the proceeds of lands sold prior to the death of said Charles F., and to pay over to the plaintiffs the said sum of thirty-five hundred dollars, or such other sum as shall be found, on said accounting, to be due to them as their share thereof, deducting therefrom such portion of the portion of said payments of two thousand dollars on account of Winona and St. Peter land sales, which was received by the plaintiffs, if any, or was received by the said Ashbel H., and paid in by purchasers after the death of said Charles F., and such portion thereof, if any, as was

not the proceeds of lands actually paid in and properly distrib-
37 uted to them; and that plaintiffs may be adjudged the owners of $\frac{2}{3}$ths of $\frac{1}{37}$th part of all unpaid contracts and securities for purchase money in the hands of said land commissioner, and that the defendant The Winona and Saint Peter Land Company be adjudged to account with the plaintiffs for all lands sold by them since the conveyance of said lands to them, and pay over to the plaintiffs the values thereof, and that said company be directed to convey to these plaintiffs an undivided two-ninths of one-thirty-seventh of all of said lands remaining unsold, and for such further relief as may be just and equitable, together with the costs and disbursements of this action.

M. D. L. COLLESTER,
Plaintiff's Attorney, Waseca, Minnesota.

GORDON E. COLE,
Of Counsel, Faribault, Minnesota.

STATE OF MINNESOTA,
County of Waseca, ss:

Edward P. Latham, being duly sworn, says that he is one of the plaintiffs in this action; that all the facts which are therein stated upon the personal knowledge of either of the plaintiffs, or within his personal knowledge, ; that he has heard the foregoing complaint read,
and knows the contents thereof, and that the same is true of his
37½ own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true; that for the purpose of verifying this complaint he is the agent of his co-plaintiff who is absent from the county where his attorney resides, and is a resident of the State of Indiana.

EDWARD P. LATHAM.

Subscribed and sworn to before me this 4th day of December, 1876.
[SEAL OF NOTARY PUBLIC.] M. D. L. COLLISTER,
Notary Public.

38 *Answer.*

District court, 5th judicial district.

STATE OF MINNESOTA,
County of Waseca:

WILLIAM H. LATHAM AND EDWARD P. LATHAM, plaintiffs,
vs.
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, SAMUEL N. HOYT, ANGUS SMITH, WILLIAM G. FARGO, BENJAMIN P. CHENEY, N. C. BARNEY, CHARLES T. BARNEY, and THE WINONA AND ST. PETER LAND COMPANY.

The defendant, Ashbel H. Barney, for himself, answers to the complaint herein:

That under and by virtue of an act of the Territory of Minnesota, approved March 3rd, 1857, entitled "A bill to incorporate the Transit Railroad Company," the said Transit Railroad Company was organized, incorporated, and created, with all the powers, rights and privileges, and

immunities and franchises in said act of incorporation specified, provided, and granted.

That by an act of Congress approved March 3d, 1857, entitled "An act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in
39 said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State," and of certain other acts amendatory thereof and supplemental thereto, and which are referred to and cited in the complaint herein, the United States granted the State or Territory of Minnesota the lands referred to in the complaint and described in the schedules attached thereto, for the purpose of aiding in the construction of a railroad from Winona, via St. Peter, to a point on the Big Sioux River, south of the 45th parallel of north latitude.

That in and by an act of the Territory of Minnesota, approved May 22d, 1857, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State,'" and granting certain lands to railroad companies therein named, the said Transit Railroad Company was authorized and empowered to survey, locate, construct, and perpetually to have,
40 use, and maintain and operate the Transit Railroad from the city of Winona on the most direct and feasable route, via St. Peter, to the Big Sioux River, south of the 45th parallel of north latitude, and for the purpose of aiding in the construction of said railroad there was by the said last-mentioned act of the legislature of the Territory of Minnesota granted to, conferred upon, and vested in the said Transit Railroad Company all the interest and estate, present and prospective, of the said Territory or future State in or to any and all the lands granted by the United States, by the act of Congress above referred to, to the Territory of Minnesota, for the purpose of aiding in the construction of said railroad.

That the said Transit Railroad Company was one of the land grant railroad companies referred to in the amendment of section ten of article nine of the constitution of the State of Minnesota, and it became entitled to and accepted the loan of the State credit provided for in the said amended section of the constitution, subject to all the provisions and conditions of said section, as amended as aforesaid, and subject to all the conditions and provisions of an act of the legislature of the Territory of Minnesota, entitled "An act concerning land-grant railroads," approved August 12th, 1858, and the bonds of the State, to the amount of five hundred thousand dollars, were issued and delivered to
41 the said Transit Railroad Company, under and in pursuance of and on the terms and conditions specified and provided in the said amended section of the constitution and in said last-cited act of the legislature.

That to secure the payment of the principal and interest of the said State bonds delivered to said Transit Railroad Company as aforesaid, the said company issued and delivered to the State of Minnesota five hundred of its first mortgage bonds of the denomination of one thousand dollars each, bearing interest at the rate of seven per cent. per annum, payable semi-annually, and granted, bargained, sold, transferred, and assigned to William Windom and John H. Harmon, as trustees, to be by them held in trust, the entire railroad of the said Transit

Railroad Company, built or to be built, and all rights, property, privileges, franchises, and immunities of the said Transit Railroad Company, of every nature and kind whatsoever which was then owned by the said company, or which should thereafter be acquired or owned by it; and all right, title, interest, or claim, either legal or equitable, which the said company had, or which it should afterwards acquire, in or to any lands under the aforesaid act of Congress, or under any of the acts of the Territory of Minnesota above referred to, and authorized the said trustees, in case the said Transit Railroad Company should fail to pay the
42 principal or interest of said State bonds or of said first mortgage bonds as the same became payable, to enter upon and take possession of all and singular the rights and interest, property, franchises, and immunities granted in trust as aforesaid, and to sell and dispose of the same for the payment of the said principal and interest as in said trust deed provided, and to make, execute, and deliver to the purchasers good and sufficient dee's of conveyance of the same; and out of the moneys arising from such sale to pay the said principal and interest; and in case of neglect or refusal of the said trustees to enter upon and take possession of and sell said property, rights, and franchises, then the governor of the State of Minnesota was, in and by said trust deed, authorized to make or cause to be made such sale and foreclosure for the purpose aforesaid: which said trust deed was filed and recorded in the office of the secretary of state, and is hereby referred to for greater certainty.

That the said Transit Rail oad Company, long prior to January, 1860, had made default in the payment of the interest due on the bonds delivered to it as aforesaid, and on the said first mortgage bonds, and the said trustees, long prior to said last-mentioned date, having neg-
43 lected and refused to foreclose the said trust deed, or to sell the said property, lands, and franchises as they were authorized and required to do as aforesaid, the governor of the State of Minnesota, on the 23d day of June, 1860, caused to be sold at public auction, and did bid in and purchase, for and in the name of the State of Minnesota, all the property, rights, privileges, and franchises pledged in said deed of trust for the sum and price of one thousand dollars, and did, on the 16th day of October, 1866, transfer and convey the same to the State of Minnesota.

That the State of Minnesota thereupon and thereby (claimed that it had) acquired and become the owner and possessed of all the rights of property, privileges, franchises, and immunities of any and every nature and kind which the said Transit Railroad Company had ever owned or possessed, and on the 10th day of March, 1862, by an act of the legislature approved that day, entitled "An act to facilitate the construction of a railroad westerly by way of St. Peter, granted, transferred, and continued to William Lamb, S. S. Homedrew, John W. Kirk, Herman Gibhart, and H. C. Stimson, and to their associates, successors, and assigns, by the name of the Winona and St. Peter Railroad Company, all the property, interest, corporate rights, privileges, and franchises of or which before had belonged to or been owned by the
44 said Transit Railroad Company for the purpose and on the terms and conditions in said act provided.

That on the 28th day of January, 1862, Lamb, Homedrew, Kirk, and Gebhart, under and in pursuance of the act of the legislature last above referred to, met at Winona and organized as a board of directors of the said Winona and St. Peter Railroad Company, and thereupon and then

and there accepted and assumed the powers and privileges thereby conferred and the duties imposed on them as such directors, and they thereupon entered upon their duties as such directors of the said Winona and St. Peter Railroad Company, claimed to have become entitled to and possessed of all and singular the lands, rights, benefits, privileges, property, franchises, and immunities which at any time theretofore had been possessed by the said Transit Railroad Company under the laws of the Territory and State of Minnesota or of the United States, or which the State of Minnesota acquired by virtue of any of the proceedings aforesaid, which lands are the same referred to in the complaint herein.

That on or about the month of December, 1862, the defendants, Danford N. Barney and Charles F. Latham, now deceased, and Jesse Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P.
45 Cheney, and this defendant purchased and became the owners of all the stock and property of every nature and kind of the Winona and Saint Peter Railroad Company, and in pursuance of the laws of the United States and of the State of Minnesota thereafter and prior to the 31st day of October, 1867, built, equipped, and put into operation the said road from Winona, westerly, as far as Waseca (one hundred and five miles), and on or about the date last aforesaid the said stockholders transferred the said stock to other parties, and made and entered into the contract set out in the complaint and marked Exhibit A.

That on and prior to the day of March, 1865, there were completed of the said line of road five sections of ten miles each and no more, running westerly from Winona to sec. 34, town. 107, range 14, and on the day of October, A. D. 1870, there were completed of said line of road thirteen sections of ten miles each and no more, running from Winona, westerly, to sec. 20, town. 109, range 26, and on the 19th day of February, 1872, and not sooner, there were constructed and completed of said line of road sixteen sections of ten miles each and no more, running from Winona, westerly, to sec. 6, town. 109, range 29, and in pursuance of the said acts of Congress and of the Territory and State of Minnesota, and on account of the building of the said line of road,
46 large quantities of lands granted by the United States to this State had, at the date aforesaid, been and have since been by this State granted and conveyed to the Winona and St. Peter Railroad Company, and by the said Winona and St. Peter Railroad Company sold from time to time to divers and sundry persons, and the proceeds thereof accounted for and paid over to the said parties of the first part in said contract, Exhibit A; but none of said lands have been conveyed to any of the said parties, their personal representatives, assigns, or to any of these defendants, except to the Winona and Saint Peter Land Company, as hereinafter alleged.

That the number of acres of land to which or to the proceeds of the sale of which the parties of the first part in said contract, Exhibit A, their heirs, personal representatives, or assigns were entitled at or prior to the time of the death of the said Charles F. Latham, or on the first day of January, 1872, or to which they have at any time since been entitled under said contract, has not been settled or determined by or between the parties thereto or by any one, but this defendant avers that the plaintiffs in their complaint have largely exaggerated and overstated the same. And this defendant further avers that the tracts or parcels of land to which or to the proceeds of the sales of which
47 the said parties of the first part in said contract, Exhibit A, their heirs, personal representatives, or assigns are or have been entitled under said contract, are and at all times hitherto have been

largely indeterminable until the decision of certain suits which now are and for a long time have been pending in the district court of the sixth judicial district of this State, between the Winona and St. Peter Railroad Company, as plaintiffs, and the St. Paul and Sioux City Railroad Company.

That in said suits are involved questions of the ownership of and right to about two hundred thousand acres of land, granted by the United States to this State, as aforesaid, to aid in the building of railroads, and if said suits are decided in favor of the plaintiffs therein the title to those lands will be decreed to and confirmed in the plaintiffs, and the said lands, or a majority of them, or the proceeds of the sales thereof, would be covered and bargained by the contract Exhibit A, but if said suits are decided against the plaintiffs therein, the said lands would go to the defendants in said action.

That after the making of the said contract (Exhibit A) to the complaint attached, the parties to the first part therein requested this defendant to take charge of their property and interest secured to them in and by said contract, and to receive, dispose of, or collect the same, and to distribute the proceeds to the parties entitled thereto, ac-
48 cording to their respective rights and interest, which he agreed to do and did; and all said property was accordingly placed in his possession and under his control, to be disposed of as aforesaid, subject to the advice and control of his said associates.

That in the month of , 1870, the said Charles F. Latham departed this life, leaving as his heirs the persons named in the complaint as such, and after his decease the said heirs and next of kin, for the purpose of saving the delay and expense incident to legal proceedings, and to secure a speedy distribution of the said estate, agreed among themselves as to the division of the said estate and as to the valuation of the property and mode of its distribution, and they applied to this defendant to aid and act for them in that respect, which he consented and agreed to do.

That in pursuance of such purpose and understanding the said contract Exhibit A and the schedule thereto attached were drawn up, and eleven originals thereof prepared and executed by such of said heirs and next of kin, and returned to this defendant, who forwarded one to each, with a statement of the sum due to each from the proceeds of the estate of the said Charles F. Latham.

That the copy of said contract and schedule to the complaint
49 attached is substantially correct, except that the following words in said copy of the schedule, "May 6, division of monies from W. & S. P. lands, $150.36," should read "May 6th, division of monies W. & S. P. land sales, $150.36," and the following words in said copy, "Int. in St. P. & W. land sales, say $10,000.00," should be "Int. in W. & St. P. lands (estimate), $10,000.00."

That it was then and there well understood, intended, and agreed by and between the said heirs and next of kin and this defendant that that clause in said schedule Exhibit B which is in these words, "Int. in W. & St. P. lands (estimate), $10,000.00," should include and cover the entire interest to which the said Charles F. Latham was in his lifetime entitled in or to the said lands, or to the proceeds of the sales thereof, except such sums of money as had theretofore been received or collected for or on account of such sales, and this defendant was then and there authorized and instructed by the said heirs and next of kin to sell or dispose of or divide all of the said property in said schedule described, and especially to sell, if possible, for the price aforesaid ($10,000), the

interest or right which the said heirs or next of kin had to the said lands or the proceeds of the sales thereof.

That this defendant, having then and there attempted to dis-
50 pose of the said interest for the said price, in pursuance of said arrangement and authority, and having failed and been unable to do so, applied to his co-defendants in this suit, Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Samuel N. Hoyt, Alfred M. Hoyt, and to Danford P. Barney (who, with defendant, owned thirty-six thirty-sevenths ($\frac{36}{37}$ths) of the interest secured by the contract Exhibit A) to purchase the same from the said heirs and next of kin for the price aforesaid.

That they consented and agreed to purchase nine-tenths thereof, if this defendant would take and hold the remaining one-tenth, so as thus to keep unexchanged their respective interests in the said property secured by the contract Exhibit A, which this defendant agreed to do.

That this defendant consented to and accepted said offer and reported the same to the said heirs and next of kin, and he then and there sold nine-tenths of the said interest to the said Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Samuel N. Hoyt, and to D. N. Barney, who then and there paid over to this defendant, for the said heirs and next of kin, the sum of nine thousand dollars, and this de-
fendant forthwith paid over to the said next of kin the said sum
51 of ten thousand dollars, for and as the purchase price of the said interest, which they accepted in full for said interest, and executed the release aforesaid.

That the sale and transfer last aforesaid is the only sale or transfer ever made by the said next of kin or by any of them to this defendant and his said associates, or to any of them, of said interest or of any part or share thereof, and the said interest was not then worth a greater sum than ten thousand dollars, and could not, as this defendant then believed and still believes, have been sold for so high a price as ten thousand dollars to any other person or persons.

That at the time of the said sale the said heirs and next of kin of said Latham resided at different States, as set out in said schedule, and this defendant could not confer with and was not requested or expected to confer with all of them as to the transactions aforesaid, but he did confer with a number of said heirs and next of kin, who met him in New York for that purpose about the distribution, valuation, and sale of the said property belonging to the estate of said Charles F. Latham, deceased, and each and every of the said next of kin who consulted with this defendant as aforesaid advised as to the proper steps to be taken, and each and every step was taken as advised by them,
52 and they were informed of each and every act done in the premises as and at the time the said was done, and they well knew that the said interest in said lands and in the uncollected proceeds was valued at ten thousand dollars, and they requested this defendant to sell the same for that price, and they were advised of the sale when made as aforesaid, and they knew the persons to whom it was made and the circumstances under which it was made as aforesaid, and they approved the same.

And this defendant on his information and belief avers that the said next of kin, who conferred and advised with and directed him as aforesaid, conferred with and advised each of the other heirs and next of kin of the said matters and things aforesaid.

That this defendant acted honestly and fairly in each and every respect in the premises, as the plaintiffs well knew, and he denies each

and every allegation of the complaint charging fraud or unfair dealing on the part of this defendant or on part of any of his co-defendants.

That thereafter, to wit, on or about the month of August, A. D. 1872, the plaintiff, Edward P. Latham, well knowing and being fully informed and advised as to all the matters and facts above alleged, ob-
53 jected to the said sale and claimed that the said property and interest sold by the said heirs and next of kin as aforesaid was worth more than ten thousand dollars, and that the said sale was not valid or binding in law on them or on the other heirs or next of kin aforesaid, and they then and there requested this defendant to consent to the re'cission of said sale and to assist and aid them in obtaining the consent of the other purchasers to a re'cission of the same, to which he consented, and thereupon this defendant applied to the said parties to whom he had made sale for the said heirs and next of kin as aforesaid, and requested them to release the plaintiff and the other heirs and next of kin of said Latham therefrom, to which they consented, and they then and there offered to rescind said sale and to transfer to the said heirs and next of kin their property and interest by them purchased as aforesaid, upon the return to them of the purchase money paid therefor, and held by the said heirs and next of kin as aforesaid, of all which this defendant then and there and frequently thereafter advised and informed these plaintiffs and the other said heirs and next of kin, and he then and there and frequently thereafter requested them
54 to consent to the re'cission of the said sale and to return and repay the said consideration paid to and held by them as aforesaid, and he often extended the time within which they might accept such offer and rescind said sale and return the consideration paid them, and he often advised them that the said offer to rescind must be accepted within a reasonable time or it could not be held open. Yet the plaintiffs did not nor would they nor did, nor would any or either of the said heirs or next of kin accept the said offer or repay the said consideration money.

That at the time of the purchase of said property for ten thousand dollars, and at the time of the offer to rescind the said purchase as aforesaid, the value of the interest or property purchased was, as the plaintiffs well knew, very uncertain, and subject to be very greatly and suddenly lessened, as hereinafter stated. Whereupon this defendant alleges and claims that the plaintiffs, and each of them, as aforesaid, ratified and confirmed the said sale, and that they and each of them are now estopped to question its validity.

That since the said purchase and service of the offer to re'cind the said purchase, and to restore the said property and interest to the heirs or next of kin of the said Charles P. Latham, or to these plaint-
55 iffs, as aforesaid, the purchasers thereof have been compelled to expend and have expended large sums of money in securing the same and in defending their rights thereto against adverse claims; and many legal questions greatly affecting its value have been decided by the courts, and the value of said interest has thereby been largely , and without such efforts of the said purchasers, and the expenditure of such large sums of money, said interest would have been greatly lessened in value or rendered valueless.

That prior to the default made by the said Transit Railroad Company to pay the interest due on its bonds as aforesaid, and prior to the forfeiture of its rights and franchise, and the acquisition thereof by the State, as aforesaid, it mortgaged and conveyed in trust its said lands and franchises to divers and sundry persons, for a valuable considera-

tion, and to secure very large sums of money, to wit, many hundred thousand dollars, and said debts thus secured remained in 1872 and still remains unsatisfied; and in the year 1870, and up until the year 1875 or 1876, it was a question involved in great doubt, and in which eminent and learned lawyers held different opinions, whether the lands and franchises of the said Transit Railroad Company, which the State claimed to have acquired and to have transferred as aforesaid to the Winona and St. Peter Railroad Company, had been thus legally
56 acquired or transferred by the State, or whether the legislature had the power to create a corporation, as it assumed to do in the said act of March 10th, 1862, or whether the said Winona & St. Peter Railroad Company was a corporation having power to take or hold lands, or whether the said lands were transferred to the said Winona & St. Peter Railroad Company or to the corporators, in said act of March 10th, 1862, named, or whether the said lands, if transferred to the said Winona & St. Peter Railroad Company, were not held by it liable for and subject to the debts of the Transit Railroad Company, and for the payment of the State bonds issued to the said Transit Railroad Company.

That the decision of any of the said questions against the Winona & St. Peter Railroad Company would have rendered the said land grant of the said company nearly or quite valueless to it, and would have rendered nearly or quite valueless the interest or claim of the said parties of the first part, in contract Exhibit A, in or to the said lands, or any part of them, or in or to the proceeds of the sales of such lands.

That, in the year 1872 and 1873, E. F. Drake, of St. Paul, in this State, and John W. Kirk, of New York, and others, as the plaintiffs well knew, claimed to be entitled to, and threatened to sue for, more than one-half of the stock, lands, franchises, and property of
57 every nature and kind of the Winona and St. Peter Railroad Company, including the lands and the proceeds of the sales of lands of said company, then owned or before that time sold by it; and in the year 1873, the said Drake commenced such suit in the district court of Ramsey County, of this State, against the Winona and St. Peter Railroad Company and this defendant and others, in which he claimed and sought to recover three eight's (3/8) of all said stock, franchises, and property, including the proceeds of the sales of any such lands; which said suit was brought in June, 1874.

That long prior to the death of the said Charles F. Latham the Winona and St. Peter Railroad Company, with the knowledge and consent, and at the instance and request of the said Charles F. Latham and his said associates, and of all the parties of the first part in said contract, attached to the complaint as Exhibit A, sold, assigned, and transferred to one person, and received the consideration for, the right to the proceeds of the sales of one undivided half of sixty-two thousand two hundred acres of lands, which were part and parcel of the lands the proceeds of the sales of which were bargained & granted by the said contract, Exhibit A.

That the plaintiffs have in their complaint largely exaggerated the number of acres to the proceeds of the sales of which the said
58 Charles F. Latham and his associates became entitled under said contract Exhibit A, and the value thereof per acre.

That this defendant is unable to state the number of acres the proceeds of the sales of which were thus bargained and the description or value thereof, but he alleges that the lands to which said Latham and his associates became entitled under said contract, Exhibit A, were

not, at the date thereof, worth to exceed one dollar per acre in the aggregate, and have not at any time since been worth two dollars per acre in the aggregate; and this defendant alleges that of the lands granted by the United States to the State of Minnesota and by the State of Minnesota to the Winona and St. Peter Railroad Company to aid in the building of railroads, not over 12,938 $\frac{38}{100}$ acres lie east of section 20, town. 109, R. 26, and not over 173,076 $\frac{92}{100}$ acres lie east of the west line of range 29.

That the proceeds of the sales of the lands bargained to the said Charles F. Latham and his associates by the said contract, Exhibit A, and received prior to January 1, 1872, were at and prior to that date distributed to the heirs and next of kin of said Latham, except so far as the same had been distributed and paid to him in his lifetime, and the remaining interest in the said lands on January 1st, 1872, or in
59 the proceeds of the sales thereof, was not worth to exceed the sum of ten thousand dollars nor could it have been sold for more than that sum. But the defendant alleges and insists that he is not nor are his said associates, or any or either of them, under any obligation, legal or equitable, to account or answer to the plaintiff or either of them as to the number of acres of such lands or the price for which any of them have been or could be sold, but, on the contrary, this defendant alleges that the plaintiffs have not, nor has either of them, any right, interest, or claim in or to any of the said lands or the proceeds of the sale thereof.

That during the years 1872 and 1873 and 1874 the plaintiffs, and each of them, well knew that the rights of this defendant and his said associates to the said lands or to the proceeds of the sales thereof were seriously questioned and attacked, and well knew that this defendant and his associates were being put to great expense and were compelled to assume great pecuniary risks in the defense thereof, and well knew that the value thereof might be destroyed or greatly lessened, yet, notwithstanding the premises, neither of these plaintiffs nor any of the said heirs or next of kin of the said Charles F. Latham offered to pay back the purchase money which they had received from the said interest, nor to rescind the said sale, which they now ask to have adjudged
60 void, though they were often requested and required so to do.

That in March, 1874, Danford N. Barney, one of the parties of the first part in said contract, Exhibit A, and one of the purchasers of the interest of the said heirs and next of kin of the said Charles F. Latham, departed this life intestate, leaving surviving him three children and his widow.

That said Danford N. Barney up to the time of his death was entitled to about one-tenth of the property secured and bargained to him and his associates by the said contract, Exhibit A, and he purchased and paid for a like share in the interest purchased of said next of kin of the said Charles F. Latham as aforesaid.

That according to the laws of the State of New York his widow inherited of his personal property one-third absolutely, and a right of dower in his realty, and at the time of his death there had been collected and were undistributed large sums of money coming from the proceeds of the sales of the said lands bargained and secured to him and his associates by the said contract, Exhibit A. And he and his said associates held many contracts made in the sales of said lands securing large sums of money aggregating over forty thousand dollars, and there have been distributed to the administrators, heirs, next
61 of kin, and widow of the said Danford N. Barney, his said full

share in and to said lands and the proceeds of the sales thereof, and the monies collected thereon prior to his death as aforesaid.

That about 18 months after the death of the said husband the said widow of the said Danford N. Barney departed this life, leaving surviving her three children of a former marriage, having by her last will and testament devised and bequeathed to her said three children all her property of every nature and kind, real, personal, or mixed, including the interest which she had inherited from her said husband, Danford N. Barney, in and to the said lands and the proceeds of the sales thereof, and the money collected therefrom, and including the interest purchased from the heirs and next of kin of the said Charles F. Latham, and the moneys collected on the sales thereof, and the said property thus left devised and bequeathed by the said widow has been distributed and paid over to her heirs and next of kin and personal representatives.

That all the matters and facts above alleged in this subdivision of this answer were well known to these plaintiffs as they occurrede and transpired, yet during all that time neither of these plaintiffs objected to such distribution of the said property or of any of it, or made
62 any to the same or any of it.

And this defendant insists that by reason of the premises the plaintiffs are and each of them is estopped to make any claim to the said lands or the proceeds of the sales thereof or to the moneys collected thereon, and this defendant further alleges, claims, and insists that there is a defect of parties defendant herein in the omission of the personal representatives and heirs and next of kin of the said Danford N. Barney, and in the omission of the personal representatives, heirs, and next of kin of the said widow of the said Danford N. Barney.

That in the spring of the year 1876, the defendant the Winona and St. Peter Land Company was organized and incorporated under the laws of the State of Minnesota, and on the request of a majority of the parties of the first part in said contract, Exhibit A, the Winona & St. Peter Railroad Company conveyed to it many of the lands to the proceeds of the sales of which they are entitled under said contract; and stock of the said the Winona and St. Peter Land Company was issued to the following named persons in proportion to their interest and rights in and to the lands or the proceeds of the sales of said lands secured by said contract Exhibit A, viz: To Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benja-
63 min P. Cheney, and Charles N. Barney.

That the said N. C. Barney is a son and one of the heirs of the said Danford N. Barney, deceased, and he took and received the stock of the said Winona and St. Peter Land Company to which he was entitled as such heir.

That the said Winona and St. Peter Land Company took said lands and holds and is selling and disposing of the same as opportunity offers for the said stockholders and not otherwise.

This defendant admits that the defendant the Winona and St. Peter Land Company is a corporation organized under the laws of this State, and that the lands referred to lie within the State and a portion of them in the county of Waseca. He also admits the existence of the several acts of Congress and of the legislature of the State of Minnesota referred to and cited in the complaint, but for greater certainty as to the contents from and effects of the said several acts, this defendant refers to the said several acts as a part of his answer.

This defendant also admits that there was vested in this State pur-

suant to said acts of Congress certain lands which prior to October, 1870, were by the State conveyed to the said Winona and St. Peter Railroad Company, and that subsequently to said date the State acquired
64 under said act of Congress certain other lands, which it conveyed to the Winona and St. Peter Railroad Company, making in the aggregate over six hundred and seventeen thousand five hundred and ten acres, but he denies that all of said lands, or that all of the lands described in schedule A, to the complaint attached, were or are the same agreed to be conveyed, in and by the contract above referred to, Exhibit A, but on the contrary he avers that many thousand acres of said lands so conveyed as last aforesaid and described in said schedule were and are lands not included in or covered or affected by the said contract.

This defendant also admits and avers that ever since the year 1862 the said Winona and St. Peter Railroad Company has at various times and as called for sold very many tracts or parcels of the lands granted by the United States to this State, and by this State to it to aid in the building of said road, and that ever since the year 1867 up to the organization of the defendant The Winona and St. Peter Land Company, the said Winona and St. Peter Railroad Company sold at various times and as called for many tracts or parcels of the lands, which *as* the proceeds of which were covered by or included in the said contract Exhibit
65 A, and accounted for and paid over to the parties of the first part in said contract Exhibit A the proceeds of such sales.

That this defendant also admits that he was by his said associates parties of the first part in said contract Exhibit A authorized to receive from the Winona and St. Peter Railroad Company the several sums properly payable to him and them from the proceeds of the sales of the said lands, and that he was by his said associates authorized to and did disburse and account for the said several sums to the parties entitled thereto respectively. And he also admits that in the spring of 1876 the defendant The Winona and St. Peter Land Company was organized as alleged, and that thereupon and since and at the request of the majority of the parties of the first part in said contract Exhibit A, the Winona and St. Peter Railroad Company conveyed to the said The Winona and St. Peter Land Company certain lands of said railroad company to the proceeds of the sales of which the parties of the first part in said contract Exhibit A were entitled as aforesaid.

Except as above admitted or answered, this defendant denies the complaint and each and every allegation and part thereof.

WILSON & TAYLOR,
Att'ys for the Def't.

66 STATE OF MINNESOTA,
County of Winona, ss:

Thomas Wilson came before me personally and, being duly sworn, doth say that he is one of the attorneys in the above entitled action; that the foregoing pleading is true, to the best of his knowledge, information and belief; and that the reason why this affidavit of verification is not made by said defendant is that he is absent from the county of Winona, Minnesota, where resides his said attorneys; and further saith not.

THOMAS WILSON.

Subscribed to before me on this 14th day of February, A. D. 1871.
[NOTARY SEAL.]
WM. A. ALLEN,
Notary Public, Minn.

COUNTY OF WASECA:

WM. H. LATHAM ET AL.
against
A. H. BARNEY ET AL.

Attorney's verification. Original. Filed March 2, 1877.
JAS. HAYDEN, *Clerk.*

WILSON & TAYLER,
Def't's Attorneys.

67 *Answer.*

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca:

WILLIAM H. LATHAM AND EDWARD P. Latham, pl'ffs,
vs.
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and The Winona and St. Peter Land Company.

The defendants, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney, for themselves, answer to the complaint.

That under and by virtue of an act of the Territory of Minnesota, approved March 3d, 1857, entitled "A bill to incorporate the Transit Railroad Company," the said Transit Railroad Company was organized, incorporated, and created with all the powers, rights, privileges, and immunities and franchises in said act of incorporation specified, provided and granted.

That by an act of Congress, approved March 3d, 1857, entitled
68 "An act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in the said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of certain railroads in said State, and of certain other acts amendatory thereof and supplemental thereto, and which are referred to and cited in the complaint herein, the United States granted to the State or Territory of Minnesota the lands referred to in the complaint and described in the schedule attached thereto, for the purpose of aiding in the construction of a railroad via St. Peter to a point on the Big Sioux River south of the 45th parallel of north latitude.

That in and by an act of the Territory of Minnesota, approved May 22d, 1857, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State, and granting certain lands to railroad com-
69 panies therein named, the said Transit Railroad Company was an-

thorized and empowered to survey, locate, construct, and perpetually to have, use, and maintain and operate the Transit Railroad, from the city of Winona, on the most direct and feasible route via St. Peter to the Big Sioux River south of the 45th parallel of north latitude. And for the purpose of aiding in the constructin of said railroad there was, by the said last mentioned act of the legislature of the Territory of Minnesota, granted to, conferred upon, and vested in the said Transit Railroad Company all the interest and estate, present and prospective, of the said Territory or future State in or to any and all the lands granted by the United States by the acts of Congress above referred to, to the Territory of Minnesota, for the purpose of aiding in the construction of said railroad.

That the said Transit Railroad Company was one of the land-grant railroad companies referred to in the amendment of section ten of article nine of the constitution of the State of Minnesota, and it became entitled to and accepted the loan of the State credit provided for in the said amended section of the constitution, subject to all the provisions and conditions of the said section as amended as aforesaid, and subject to all the conditions and provisions of an act of the legislature
70 of the Territory of Minnesota entitled an act concerning land grant railroads, approved Aug. 12th, 1858, and the bonds of the State, to the amount of five hundred thousand dollars, were issued and delivered to the said Transit Railroad Company, under and in pursuance of and on the terms and conditions specified and provided in the said amended sections of the constitution and in said last cited act of the legislature.

That to secure the payment of the principal and interest of the said State bonds, delivered to said Transit Railroad Company as aforesaid, the said company issued and delivered to the State of Minnesota five hundred of its first mortgage bonds of the denomination of one thousand dollars each, bearing interest at the rate of seven per cent. per annum, payable semi-annually, and granted, bargained, sold, transferred and assigned to William Windom and John H. Harmon, as trustees, to be by them held in trust, the entire railroad of the said Transit Railroad Company built, or to be built, and all rights, property, privileges, franchises and immunities of the said Transit Railroad Company, of every nature and kind whatsoever, which was then owned by the said company, or which should thereafter be acquired or owned by it, and all rights, title, interest or claim, either legal or equitable, which the said company had or it should afterwards acquire in or to any lands
71 under the aforesaid act of Congress, or under any of the acts of the Territory of Minnesota above referred to, and authorized the said trustees, in case the said Transit Railroad Company should fail to pay the principal or interest of said State bonds, or of said first mortgage bonds, as the same became payable, to enter upon and take possession of all and singular the rights and interest, property, franchises and immunities granted in trust as aforesaid, and to sell and dispose of the same for the payment of the said principal and interest, as in said trust deed provided, and to make, execute and deliver to the purchasers good and sufficient deeds of conveyance of the same, and out of the moneys arising from such sale to pay the said principal and interest, and in case of neglect or refusal of the said trustees to enter upon and take possession of and sell said property, rights and franchises, then the governor of the State of Minnesota was in and by said trust deed authorized to make, or cause to be made, such sale and foreclosure for the purpose aforesaid, which said trust deed was filed and recorded in the

office of the secretary of state, and is hereby referred to for greater certainty.

That the said Transit Railroad Company long prior to January, 1860, had made default in the payment of the interest due on the bonds
72 delivered to it as aforesaid, and on the said first mortgage bonds.

And the said trustees, long prior to said last-mentioned date, having neglected and refused to foreclose the said trust deed, or to sell the said property, lands and franchises as they were authorized and required to do as aforesaid, the governor of the State of Minnesota, on the 23d day of June, 1860, caused to be sold at public auction, and did bid in and purchase for and in the name of the State of Minnesota, all the property, rights and privileges, and franchises pledged in said deed of trust for the sum and price of one thousand dollars, and did, on the 16th day of October, 1866, transfer and convey the same to the State of Minnesota.

That the said State of Minnesota thereupon and thereby claimed that it had acquired and became the owners, and pos'essed of all the rights, property, privileges, franchises and immunities of any and every nature and kind which the said Transit Railroad Company had ever owned or pos'essed; and on the 10th day of March, 1862, by an act of the legislature approved that day, entitled "An act to facilitate the construction of a railroad westerly by way of St. Peter, granted, transferred and continued to William Lamb, S. S. L. Homedrew, John W. Kirk, Herman Gibhart and H. C. Stimpson, and to their associates, successors and assigns, by the name of the Winona and St. Peter Railroad Com-
73 pany, all the property, interest, corporate rights, privileges and franchises of, or which before had belonged to or been owned by, the said Transit Railroad Company, to be held by the said Winona and St. Peter Railroad Company for the purpose and on the terms and conditions in said act provided.

That on the 28th day of June, A. D. 1862, the said Lamb L. Homedrew, Kirk and Gibhart, under and in pursuance of the act of the legislature last above referred to, met at Winona and organized as a board of directors of the said Winona and St. Peter Railroad Company, and assumed the powers and privileges thereby conferred, and the duties imposed on them as such directors, and they thereupon entered upon their duties as such directors of the Winona and St. Peter Railroad Company.

That thereupon the said Winona and St. Peter Railroad Company claimed to have become entitled to and pos'essed of all and singular the lands, rights, benefits, privileges, property, franchises and immunities which at any time theretofore had been pos'essed by the said Transit Railroad Company, under the laws of the Territory and State of Minnesota, or of the United States, or which the State of Minnesota acquired by virtue of any of the proceedings aforesaid, which lands are the same referred to in the complaint herein.

74 That on or about the month of December, A. D. 1862, Danford N. Barney and Charles F. Latham, since deceased, and the defendants Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo and Benjamin P. Cheney purchased and became the owners of all the stock and property of every nature and kind of the Winona and St. Peter Railroad Company, and in pursuance of the laws of the United States and of the State of Minnesota, thereafter and prior to the 31st day of October, 1867, built, equipped and put into operation the said road from Winona westerly as far as Waseca (one hundred and five miles), and on or about the date last aforesaid the said stockholders transferred the said stock to other

parties and made and entered into the contract set out in the complaint, and marked Exhibit A.

That on and prior to the day of March, 1865, there were completed of the said line of road five sections of ten miles each and no more, running westerly from Winona to sec. 34, town. 107, range 14; and on the day of October, 1870, there were completed of said line of road thirteen sections of ten miles each, and no more, running from Winona westerly to sec. 20, town. 109, range 26, and on the 19th day of February, A. D. 1872, and not sooner, there were constructed and completed of said line of road sixteen sections of ten miles each, and no more, running from Winona westerly to sec. 6, town. 109,
75 range 29; and in pursuance of said acts of Congress, and of the Territory and State of Minnesota, and on account of the building of said line of road, large quantities of the lands granted by the United States to this State had at the date aforesaid been, and have since been by this State granted and conveyed to the Winona and St. Peter Railroad Company, and by the said Winona and St. Peter Railroad Company sold from time to time to divers and sundry purchasers, and the proceeds thereof accounted for and paid over to the said parties of the first part in said Exhibit A, but none of said lands have been conveyed to any of the said parties, their personal representatives or assigns, or to any of these defendants except to the Winona and St. Peter Land Company as hereinafter alleged.

That the number of acres of land to which or to the proceeds of the sales of which the parties of the first part in said contract, Exhibit A, their heirs, personal representatives, or assigns, were entitled at or prior to the time of the death of the said Charles F. Latham, or on the first day of January, 1872, or to which they have at any time since been entitled under said contract, has not been settled or determined by or between the parties thereto or by any one; but the defendants aver that the plaintiffs in their complaint have largely exaggerated and overstated the same.

And the defendants further aver that the tracts or parcels of
76 land to which or to *to* the proceeds of the sales of which the said parties of the first part in the said contract Exhibit A, their heirs, personal representatives, or assigns, are or have been entitled under said contract are and at all times hitherto have been largely indeterminable and must continue to be indeterminable until the decision of certain suits which now are and for a long time have been pending in the district court of the sixth judicial district in this State, between the Winona and St. Peter Railroad Company as plaintiffs, and the St. Paul and Sioux City Railroad Company.

That in said suits are involved questions of the ownership of and right to about two hundred thousand acres of the lands granted by the United States to this State as aforesaid to aid in the building of railroads, and if said suits are decided in favor of the plaintiffs therein, the title to these lands will be decreed to and confirmed in the plaintiffs, and the said lands or a majority of them, or the proceeds of the sales thereof, would be covered and bargained by the said contract, Exhibit A, but if said suits are decided against the plaintiff therein the said lands would go to the defendants in said action.

That in the month of , A. D. 1870, the said Charles F.
77 Latham departed this life leaving as his heirs the persons named in the complaint as such, and after his decease the said heirs and next of kin, for the purpose of saving the delay and expense incident to legal proceedings to effect a distribution of his estate, agreed

among themselves as to the division of the said estate and the amount going to and receivable by each of the said next of kin, and the valuation of the property, and mode of its sale and distribution, and in pursuance of and as a part of such an agreement they caused to be drawn up and executed the contract attached to the complaint as Exhibit B (with the schedule thereto attached), eleven originals of which were executed by each of said heirs or next of kin; and the said property referred to and described in said schedule was understood and intended to and did include all the property of which said Charles F. Latham died possessed.

That for the purpose of carrying out the said agreement and effecting such a disposition the said heirs and next of kin applied to the defendant Ashbel H. Barney to aid and act for them in that respect, which he consented and agreed to do, and in pursuance of such arrangement and understanding the said eleven originals of the said contract executed as aforesaid were delivered to him, and he forwarded one to each of said heirs or next of kin.

78 That the copy of the said contract and schedule (Exhibit B, attached to the complaint) is substantially correct, except that the following words in said copy: "May 6th, division of moneys from W. & St. Peter lands, 150.36," should read "May 6th, division of moneys, W. & St. P. land sales, 150.36," and the following words in said copy: "Int. in W. & St. P. land sales, say, $10,000.00," should be "Int in W. & S. P. lands (estimates) $10,000."

That it was then and there understood and intended by the said heirs and next of kin of the said Ashbel H. Barney, that that clause in the schedule Exhibit B, which is in these words. "Int. in W. & St. P. lands (estimate) $10,000.00," should include and cover the entire interest of which the said Charles F. Latham was in his lifetime entitled in or to the said lands or the proceeds of the sales thereof, except such sums of money as had theretofore been received or collected for or on account of such sales.

And the said Ashbel H. Barney was authorized and instructed by the said heirs or next of kin to sell or dispose of or divide all of the said property in said schedule described, and especially to sell for the price aforesaid, "ten thousand dollars," all the interest or right which the said heirs or next of kin had in or to the said lands or the proceeds of the sales thereof.

79 That the said Ashbel H. Barney having then and there attempted to sell and dispose of the said interest for the said price, in pursuance of said arrangement and authority, and having failed and been unable to do so, applied to the defendants Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Samuel N. Hoyt, Alfred M. Hoyt, and to Danford N. Barney, who with the said Ashbel H. Barney, then owned $\frac{36}{37}$ of the interest secured by the said contract (Exhibit A), to purchase the same from the said heirs and next of kin for the price aforesaid; that they consented and agreed to purchase nine-tenths thereof on the condition that the said Ashbel H. Barney, who then owned about one tenth of the property and interest secured by the said contract Exhibit A, would purchase and hold the remaining one-tenth, so as to keep the proportionate share of the said associates unchanged, which he agreed to do; and the defendants, Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Samuel N. Hoyt, Alfred M. Hoyt, and the said Danford N. Barney, then and there purchased nine-tenths of said interest of said next of kin, and paid over to the said Ashbel H. Barney therefor, for the said heirs and next

of kin, the said sum of nine thousand dollars; and the said Ashbel H. Barney, as these defendants are informed and believes,
80 paid over to the said heirs and next of kin of said Latham the said sum of $10,000.00, which they received in full for said interest, and executed and delivered the said release as aforesaid.

That the sale and transfer last aforesaid was the only sale or transfer ever made by the said heirs or next of kin of said Latham, or by any of them, to the parties aforesaid, or to any of them, of their said interest, or of any part or share thereof; and the said interest was not then worth nor could it have been sold for any greater sum or price than ten thousand dollars.

That thereafter, to wit, on or about the month of August, 1872, the plaintiff, Edward P. Latham, and in or about the month of January, 1873, the plaintiff, William H. Latham, well knowing and being fully informed and advised as to all the matters and facts above alleged, objected to the said sale, and claimed that the said property and interest sold by the said heirs and next of kin, as aforesaid, was worth more than ten thousand dollars, and that the said sale was not valid or binding in law on them or on the other heirs or next of kin aforesaid; and they then and there requested the said Ashbel H. Barney to consent to the recission of said sale, and to assist and aid them in obtaining the consent of the purchasers to a recission of the same, to which he
81 consented; and thereupon the said Ashbel H. Barney applied to the said parties to whom he had made said sale for the said heirs and next of kin as aforesaid, and requested them to release the plaintiff and the other heirs and next of kin of said Latham therefrom, to which they consented; and they then and there offered to rescind said sale, and to transfer to said heirs and next of kin their property and interest by them purchased as aforesaid, upon the return to them of the purchase money paid therefor and held by the said heirs and next of kin, as aforesaid; of all which the said Ashbel H. Barney then and there and frequently thereafter advised and informed these plaintiffs and the other said heirs and next of kin; and he then and there, and frequently thereafter, requested them to consent to the recission of said sale, and to return and repay the said consideration paid to and held by them as aforesaid; and he often extended the time within which they might accept such offer and rescind said sale, and return the consideration paid them; and he often advised them that the said offer to rescind must be accepted within a reasonable time or it could not be held open. Yet the plaintiffs did not, nor would they, nor did nor would any or either of the said heirs or next of kin, accept the said offer or repay the said consideration money.

82 That at the time of the purchase of said property for $10,000, and at the time of the offer to rescind the said purchase as aforesaid, the value of the interest or property purchased was, as the plaintiffs well knew, very uncertain, and subject to be very greatly and suddenly lessened, as hereinafter stated.

Wherefore the defendants allege and claim that the plaintiffs and each of them, as aforesaid, ratified and confirmed the said sale, and that they and each of them are now estopped to question its validity.

That since the said purchase and since the offer to rescind the said purchase, and to restore the said property and interest to the heirs and next of kin of said Charles F. Latham, or to these plaintiffs, as aforesaid, the purchase thereof have been compelled to expend large sums of money in securing the same and in defending their rights thereto against adverse claims, and many legal questions greatly affecting its

value have been decided by the courts, and the value of said interest has thereby been largely enhanced, and without such efforts of the said purchasers and the expenditure of such large sums of money said interest would have been greatly lessened in value or rendered valueless.

83 That prior to the default made by said Transit Railroad Company to pay the interest due on its bonds, as aforesaid, and prior to the forfeiture of its rights and franchises and the acquisition thereof by the State, as aforesaid, it mortgaged and conveyed in trust its said lands and franchises to divers and sundry persons for a valuable consideration, and to secure very large sums of money, to wit, many hundred thousand dollars, and said debts thus secured remained in 1872 and still remain unsatisfied; and in the year 1870, and up until the year 1875 or 1876, it was a question involved in great doubt, and on which eminent and learned lawyers held different opinions, whether the lands and franchises of the said Transit Railroad Company, which the State claimed to have acquired and to have transferred, as aforesaid, to the Winona and St. Peter Railroad Company, had been thus legally acquired or transferred by the State, or whether the legislature had the power to create a corporation as it assumed to do in the said act of March 10th, 1862, or whether the said Winona and St. Peter Railroad Company was a corporation having power to take or hold lands, or whether the said lands were transferred to the said Winona and St.

84 Peter Railroad Company, or to the corporation in said act of March 10th, 1862, named, or whether the said lands, if transferred to the said Winona and St. Peter Railroad Company, were not held by it liable for and subject to the debts of the Transit Railroad Company, and for the payment of the State bonds issued to the said Transit Railroad Company.

That the decision of any of the said questions against the Winona and St. Peter Railroad Company would have rendered the said land grant of the said company nearly or quite valueless to it, and would have rendered nearly or quite valueless the interest or claim of the said parties of the first part in contract Exhibit A in or to the said lands or any of them, or in or to the proceeds of the sales of said lands.

That in the year 1872 and 1873, E. F. Drake, of St. Paul, in this State, and John W. Kirk, of New York, and others, as the plaintiffs well knew, claimed to be entitled to, and threatened to sue for more than one-half of the stock, lands, franchises, and property of every nature and kind of the Winona and St. Peter Railroad Company, including the lands and the proceeds of the sales of lands of said company then owned or before that time sold by it; and in the year 1873 the said Drake commenced such suit in the district court of Ramsey County, in this State, against the Winona and St. Peter Railroad Company, and the defendants Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Augus Smith, William G. Fargo, Benjamin P. Cheney, and others,

85 in which the act claimed and sought to receive three-eighths (3/8) of all said stock, franchises, and property, including the proceeds of the sales of any such lands; which said suit was brought on for trial and tried in June, 1878.

That long prior to the death of the said Charles F. Latham, the Winona & St. Peter Railroad Company, with the knowledge and consent and at the instance and request of the said Charles F. Latham and his associates, and of all the parties of the first part in said contract, attached to the complaint as Exhibit A, sold, assigned, and transferred to one person, and received the consideration for the right to the proceeds

of the sales of one undivided half of sixty-two thousand two hundred acres of lands, which were part and parcel of the lands, the proceeds of the sales of which were bargained and granted by the said contract, Exhibit A.

That the plaintiffs have, in their complaint, largely exaggerated the number of acres, to the proceeds of the sales of which the said Charles F. Latham and his associates became entitled under said contract, Exhibit A, and the value thereof per acre.

That the defendants are unable to state the number of acres, the proceeds of the sales of which were thus bargained, and the description or value thereof. But they allege that the lands to which said Latham and his associates became entitled under said contract, Exhibit A, were not, at the date thereof, worth to exceed one dollar per acre in
86 the aggegate, and have not, at any time since, been worth two dollars per acre in the aggregate; and they allege that of the lands granted by the United States to the State of Minnesota and by the State of Minnesota to the Winona & St. Peter Railroad Company to aid in the building of railroads, not over 129,580$\frac{28}{100}$ acres lie east of sec. 20, town. 109, range 26, and not over 173,076$\frac{02}{100}$ acres lie east of the west line of range 29.

That the proceeds of the sales of the lands bargained to the said Charles T. Latham and his associates by the said contract, Exhibit A, and received prior to January 1st, 1872, were, on or prior to that date, distributed to the heirs and next of kin of said Latham, except so far as the same had been distributed and paid to him in his lifetime, and the remaining interest in the said lands, on January 1st, 1872, or in the proceeds of the sale thereof, was not worth to exceed the sum of ten thousand dollars, nor could it have been sold for more than that sum. But the defendants allege and insist that they are not nor are their said associates, or any or either of them, under any obligation, legal or equitable, to account or answer to the plaintiffs, or either of them, as to the number of acres of such land or the price for which any of them have been or could be sold; but, on the contrary, the defendants allege that the plaintiffs have not, nor has either of them,
87 any right, interest, or claim in or to any of the said lands or the proceeds of the sales thereof.

That during the year 1872, 1873, and 1874, the plaintiffs and each of them well knew that the rights of the defendants and their said associates to the said lands or to the proceeds of the sales thereof were seriously questioned and attacked, and well knew that the defendants and their associates were being put to great expense, and were compelled to assume great pecuniary risks in the defence thereof, and well knew that the value thereof might be destroyed or greatly lessened. Yet, notwithstanding the premises, neither of these plaintiffs nor any of the said heirs or next of kin of the said Charles F. Latham offered to pay back the purchase money which they had received for the said interest, nor to rescind the sale which they now ask to have adjudged void, though they were often requested and required so to do.

That in March, 1874, Danford N. Barney, one of the parties of the first part in said contract, Exhibit A, and one of the purchasers of the interest of the said heirs and next of kin of the said Charles F. Latham, departed this life intestate, leaving surviving him three children and his widow.

88 That said Danford N. Barney, up to the time of his death, was entitled to about one-tenth of the property secured and bargained to him and his associates by the said contract, Exhibit A, and he pur-

chased and paid for a like share in the interest purchased of the said next of kin of the said Charles F. Latham as aforesaid.

That according to the laws of the State of New York his widow inherited of his personal property one-third absolutely, and a right of dower in his realty, and at the time of his death there had been collected and were undistributed large sums of money coming from the proceeds of the sales of the said lands bargained and secured to him and his associates by the said contract, Exhibit A, and he and his said associates held many contracts made in the sales of the said lands, securing large sums of money, aggregating over forty thousand dollars; and there were distributed to the administrators, heirs, next of kin, and widow of said Danford N. Barney his said full share in and to said lands and the proceeds of the sales thereof, and the moneys collected thereon prior to his death, as aforesaid.

That about eighteen months after the death of her said husband, the said widow of the said Danford N. Barney departed this life, leav-
89 ing surviving her three children of a former marriage, having by her last will and testament devised and bequeathed to her said three children all her property of every nature or kind, real, personal, or mixed, including the interest which she had inherited from her said husband, Danford N. Barney, in and to the said lands and the proceeds of the sales thereof, and the money collected therefrom, and including the interest purchased from the heirs and next of kin of the said Charles F. Latham and the moneys collected on the sales thereof; and the property thus left, devised, and bequeathed by the said widow has been distributed and paid over to her heirs and next of kin and personal representatives.

That all the matters and facts above alleged in this subdivision of this answer were well known to these plaintiffs as they occurred and transpired; yet, during all that time, neither of these plaintiffs objected to such distribution of the said property or of any of it, or made any claim to the same, or to any of it.

And the defendants insist that by reason of the premises the plaintiffs are, and each of them is estopped to make any claim to the said lands or the proceeds of the sales thereof, or to the moneys col-
90 lected thereon; and these defendants further allege, claim, and insist that there is a defect of parties defendant herein in the omission of the personal representatives and heirs and next of kin of the said Danford N. Barney, and in the omission of the personal representatives, heirs, and next of kin of the said widow of the said Danford N. Barney.

That in the spring of the year 1876 the defendant, the Winona and St. Peter Land Company, was organized and incorporated under the laws of the State of Minnesota, and on the request of the majority of the parties of the first part in said contract, Exhibit A, the Winona and St. Peter Railroad Company conveyed to it many of the lands to the proceeds of the sales of which they are entitled under said contract; and stock of the said The Winona and St. Peter Land Company was issued to the following named persons, in proportion to their interest and rights in or to the lands and the proceeds of the sales of the lands conveyed by said contract, Exhibit A, viz, Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles L. Barney.

That the said N. C. Barney is a son and one of the heirs of the
91 said Danford N. Barney, deceased, and he took and received the

stock of the Winona and St. Peter Land Company to which he was entitled as such heir.

That the said Winona and St. Peter Land Company took said lands, and holds and is selling and disposing of the same as opportunity offers for the said stockholders, and not otherwise.

These defendants admit that the defendant The Winona & St. Peter Land Company is a corporation organized under the laws of this State, and that the lands referred to lie within this State, and a portion of them in the county of Waseca.

They also admit the existence of the several acts of Congress and of the legislature of the State of Minnesota referred to and cited in the complaint, but, for greater certainty as to the contents, form, and effects of the said several acts, these defendants refer to the said several acts as a part of this their answer.

They also admit that there was vested in this State, pursuant to said acts of Congress, certain lands, which, prior to October, 1870, were by this State conveyed to the said Winona and St. Peter Railroad Company, and that subsequently to said date the State acquired under said acts of Congress certain other lands which it conveyed to the said Winona & St. Peter Railroad Company, making in the aggregate over six hundred and seventeen thousand five hundred and ten acres, but they deny that all of said lands, or that all of the lands described in Schedule A to the complaint attached, were or are the same agreed to be conveyed in and by the contract above referred to (Exhibit A), but, on the contrary, they aver that many thousand acres of said lands so conveyed as last aforesaid and described in said schedule were and are lands not included in or covered or affected by the said contract.

92

These defendants also admit and aver that ever since the year 1862 the said Winona and St. Peter Railroad Company has at various times, and as called for, sold very many tracts or parcels of the lands granted by the United States to this State, and by this State to it, to aid in the building of said road, and that ever since the year 1867 up to the organization of the defendant The Winona and St. Peter Land Company, the said Winona and St. Peter Railroad Company sold at various times, and as called for, many tracts or parcels of lands which, as the proceeds of which were covered by or included in said contract, Exhibit A, and accounted for and paid over to the parties of the first part in said contract, Exhibit A, the proceeds of such sales.

93

The defendants also admit that the defendant Ashbel H. Barney was by his said associates, parties of the first part in said contract, Exhibit A, authorized to receive from the Winona and St. Peter Railroad Company the several sums properly payable to him and them from the proceeds of the sales of the said lands, and that he was by his said associates authorized to and did disburse and account for the said several sums to the parties entitled thereto respectively; and they also admit that in the spring of 1876 the defendant, The Winona and St. Peter Land Company, was organized as alleged, and that thereupon and since, at the request of the majority of the parties of the first part in said contract, Exhibit A, the Winona & St. Peter Railroad Company conveyed to the said the Winona and St. Peter Land Company certain lands of said railroad company to the proceeds of the sales of which the parties of the first part in said contract, Exhibit A, were entitled as aforesaid.

Except as above admitted or answered, these defendants deny the complaint, and each & every allegation and part thereof.

WILSON & TAYLOR,
Att'ys for the Def't.

94 STATE OF MINNESOTA,
County of Winona, ss:

Thomas Wilson came before me personally, and, being duly sworn, doth say that he is one of the attorneys in the above-entitled action; that the foregoing pleading is true to the best of his knowledge, information, and belief, and the reason why this affidavit of verification is not made by said defendants or one of them is that they are absent from the county of Winona, Minnesota, where resides their said attorneys. And further saith not.

THOMAS WILSON.

Subscribed to before me on this 13th day of February, A. D. 1877.
[NOT. SEAL.] W. A. ALLEN,
Notary Public, Minn.

District court, fifth judicial district. County of Waseca. William H. Latham et al. against Ashbel H. Barney et al. Answer. Filed March 20, 1877. James Hayden, clerk. Copy. Wilson Taylor, defendants' attorney.

95 *Answer.*

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca:

WM. H. LATHAM AND EDWARD P. LATHAM, PL'FFS,
vs.
ASHBEL H. BARNEY, JESSE HOYT, ALRED M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles Barney, and the Winona & St. Peter Land Company, def'ts.

The defendant, the Winona and St. Peter Land Company, answers to the complaint herein.

That it admits that it was created and organized under the laws of the State of Minnesota in the month of , 1876, as in the complaint alleged; and it admits that subsequent to its incorporation and prior to the commencement of this action certain lands were conveyed to it by the Winona & St. Peter Railroad Company, without any consideration by it paid to said Winona & St. Peter Railroad Company therefor; that all of its stock is held by the other defendants herein, and by the
96 heirs or personal representatives of Danford N. Barney, deceased, and that it holds and disposes of the said lands for and pays over the proceeds thereof to the said stockholders; and that said lands conveyed to it as aforesaid are part of the lands granted by the United States to this State, and by this State to the said Winona and St. Peter Railroad Company, under the acts of Congress and of the legislature of the State of Minnesota in the complaint herein referred to.

That except the allegations above answered and admitted, it avers that it has no knowledge or information sufficient to form a belief as to any of the matters alleged in the complaint. And it admits that, if the relief prayed for in the complaint against the other defendants is granted, that it is liable to and should and will account with the plaintiffs as prayed for in the complaint.

It also alleges that it is unwilling to contend with the plaintiffs in this action, and that if the matters at issue herein between the plaintiffs and its co-defendants are decided in favor of the former, it consents that the matters and facts established and proven as against its co-defendants may and shall be considered as established and proven against
97 it; and that judgment may be entered accordingly, and that the plaintiffs in that event may have such judgment against it as to the court may seem equitable and proper.

WILSON & TAYLOR,
Attorneys for the Def't.

District court. Waseca County. Wm. H. Latham et al. vs. A. H. Barney et al. Answer of W. and St. P. L. Company. Original. Filed March 20th, 1877. Jas. Hayden, clerk.

98 *Petition.*

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca:

WILLIAM H. LATHAM AND EDWARD P. LATHAM
against
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and the Winona & St. Peter Land Company.

To the honorable the district court for the fifth judicial district, Waseca County, of the State of Minnesota:

The petition of Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney, defendants above named, respectfully show that your petitioners, Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, William G. Fargo, N. C. Barney, and Charles T. Barney are defendants in the above-entitled action, and that they are, and each of them is and at the time of bringing this suit they
99 were, and each of them was, a citizen and resident of the State of New York; and that your petitioner, Angus Smith, is a defendant in the above-entitled action, and that he is, and at the time of the beginning of this suit was, a citizen and resident of the State of Wisconsin; and that your petitioner, Benjamin P. Cheney, is a defendant in the above entitled action, and is, and at the time of the bringing of this suit was, a citizen and a resident of the State of Massachusetts.

That your petitioners above named include and are all of the defendants in this suit but the Winona and St. Peter Land Company, which is a corporation created and organized by and under the laws of the State of Minnesota.

That the plaintiff, William H. Latham, is, and at the time of bringing of the action was, a resident and citizen of the State of Indiana, and the plaintiff, Edward P. Latham, is, and at the time of bringing this suit was, a resident and citizen of the State of Minnesota.

That this suit was brought by the above-named plaintiffs, William H. and Edward P. Latham, on the 11th day of December, A. D. 1876, in the said district court of the State of Minnesota in and for the county of Waseca, in the fifth judicial district of said State.

And your petitioners further represent and show that in this
100 suit the matter in dispute between the plaintiffs and these petitioners, defendants, and between the plaintiffs and each of these petitioners exceeds, exclusive of costs, the sum and value of five hundred dollars.

That the plaintiffs claim in the summons and complaint in this suit against these petitioners, defendants, the sum of thirty-five hundred dollars, and the undivided two-ninths of one thirty-seventh part of five hundred and twenty thousand acres of land lying in this State, alleged in the complaint to be of the value of ten dollars per acre, and this suit is brought by these plaintiffs against these petitioners, defendants, demanding the said sum of thirty-five hundred dollars and $\frac{2}{9}$ of $\frac{1}{37}$ part of the said 520,000 acres of land.

That in this suit the controversy is and the issues are wholly between the plaintiffs and these petitioners, defendants, and the entire controversy in this suit and all the issues therein can be fully determined as between the plaintiffs and these petitioners, defendants, and the defendant, the Winona and St. Peter Land Company, is not a necessary party to or in the trial or determination of the said controversy or issues or any of them.

That these petitioners refer to the complaint and answer in the suit as a part of this their petition.

101 And your petitioners further respectfully represent that this suit has not been tried nor has there been in the said county of Waseca since this suit was commenced or issue joined therein any term of court at which this suit could have been tried, but that this suit is now pending for trial in the said district court of the said State of Minnesota for said county of Waseca, and that said petitioners desire to remove the same before the trial thereof into the circuit court of the United States for the district of Minnesota, in pursuance of the provisions of a law as contained in the act of Congress approved March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

And your petitioners represent that they are ready and willing to give such good and sufficient surety as this court may direct for their doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States courts, and they offer herewith their bond executed by them as principals, and by Thomas Wilson and H. W. Lamberton, of the city of Winona, in said State, as sureties, in the penal sum of twenty-five hundred dollars, conditioned
102 that your petitioners shall enter in the next circuit court of the United States to be held in the district of Minnesota, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and for doing such other appropriate acts as are required to be done by said act of Congress on the removal of a suit into the United States circuit court.

And your petitioners therefore pray that the said bond and this petition may be accepted by this court, and that this suit may be removed into the next circuit court of Minnesota, pursuant to the statute in such

case made and provided, and that no further proceedings may be had therein in this court.

WILSON AND TAYLOR,
Attorneys for Petitioners.
ASHBEL H. BARNEY,
JESSE HOYT,
ALFRED M. HOYT,
SAMUEL N. HOYT,
ANGUS SMITH,
WILLIAM G. FARGO,
BENJAMIN P. CHENEY,
N. C. BARNEY,
103 CHARLES T. BARNEY,
By their attorney in fact, THOMAS WILSON.

STATE OF MINNESOTA,
County of Winona, ss:

Thomas Wilson, having been first duly sworn, doth depose and say that he is one of the attorneys for the above named petitioners in this action, and also attorney in fact of the said petitioners, and, as such, he is specially authorized by them to make the above petition and to execute it and the accompanying bond for the removal of this suit into the United States circuit court. That the above petition is true of this deponent's knowledge, except as to matters therein stated on his information and belief, and as to those matters he believes it to be true.

THOMAS WILSON.

Subscribed & sworn to before me this 16th day of March, 1877.
[NOTARIAL SEAL.]
WM. A. ALLEN,
Notary Public, Winona Co.

104 *Bond.*

District court, 5th judicial district.

STATE OF MINNESOTA,
County of Waseca:

WILLIAM H. LATHAM AND EDWARD P. LATHAM
vs.
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and The Winona & St. Peter Land Company.

We, Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, William G. Fargo, N. C. Barney, and Charles T. Barney, of the city of New York, in the State of New York, and Angus Smith, of the State of Wisconsin, and Benjamin P. Cheney, of the State of Massachusetts, as principals, and Thomas Wilson and H. W. Lamberton as sureties, are held and firmly bound unto William H. Latham, of the State of Indiana, and Edward P. Latham, of the State of Minnesota, in the sum of twenty-five hundred dollars, lawful money of the United States of America, to be paid to the said William H. Latham and Edward P. Latham, their
105 successors or assigns, for which payment, well and truly to be

made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this day of March, A. D. 1877.

Whereas a suit was brought on or about the 11th day of December, A. D. 1877, in the said district court of the State of Minnesota, in and for the county of Waseca (in the 5th judicial district of said State), by the said William H. Latham and Edward P. Latham, against the said Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, William G. Fargo, N. C. Barney, Angus Smith, Benjamin P. Cheney, Charles T. Barney and the Winona and St. Peter Land Company, and the same is now pending for trial in the district court in and for said county and State, and is removable into the circuit court of the United States for the district of Minnesota, under the act of Congress, approved March 3d, 1875, entitled 'An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

And whereas the said Ashbel H. Barney, Jesse Hoyt, Alfre Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney and Charle T. Barney have filed their
106 petition in said district court of the State of Minnesota, in and for said county of Waseca, and fifth judicial district of said State, for the removal of said suit into the next circuit court of the United States to be held in and for the district of Minnesota:

Now, therefore, the condition of the above obligation is such that if the above bounden Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney, or their legal representatives, shall enter or cause to be entered in the circuit court of the United States for the district of Minnesota, on the first day of its session next ensuing, a copy of the record in such suit, and pay all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and appear in said circuit court on the first day of the next term, and do or cause to be done such other appropriate acts as by the said act of the Congress approved March 3d, 1875, are required to be done upon the removal of a suit into the United States circuit court, then the above obligation to be void; otherwise to remain in full force and virtue.

ASHBEL H. BARNEY, [L. S.]
JESSE HOYT, [L. S.]
ALFRED M. HOYT, [L. S.]
107 SAMUEL N. HOYT, [L. S.]
ANGUS SMITH, [L. S.]
WILLIAM G. FARGO, [L. S.]
BENJAMIN P. CHENEY, [L. S.]
N. C. BARNEY, [L. S.]
CHARLES T. BARNEY, [L. S.]
By their attorney in fact, THOMAS WILSON. [L. S.]
THOMAS WILSON. [L. S.]
H. W. LAMBERTON. [L. S.]

In presence of—
WM. A. ALLEN.
ROBERT TAYLOR.

STATE OF MINNESOTA,
County of Winona, ss:

I do hereby certify that on this 16th day of March, 1877, before me, a

notary public in and for said county and State, personally appeared Thomas Wilson, attorney in fact of Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles F. Barney, the said Wilson being personally known to me, and to be such attorney in fact, and he acknowledged that he, as such attorney in fact, executed the within bond for and as the act of his said constituents. And the said Thomas Wilson and H. W. Lamberton, to me known to be the persons described in and who executed the foregoing instrument, and severally
108 acknowledged to me that they executed the same as their own free act and deed for the uses and purposes therein set forth.

[NOTARY SEAL.] WILLIAM A. ALLEN,
Notary Public.

STATE OF MINNESOTA,
County of Winona, ss:

Thomas Wilson and H. W. Lamberton, the sureties in the foregoing and within bond named, being duly sworn, each doth depose and say for himself, that he is a resident of the State of Minnesota and a freeholder therein, and is worth the sum of five thousand dollars over and above all his debts and liabilities, exclusive of property exempt by law from execution.

THOMAS WILSON.
H. W. LAMBERTON.

Subscribed & sworn to before me this 16th day of March, 1877.

[NOTARY SEAL.] WILLIAM A. ALLEN,
Notary Public.

(Indorsed:) District court, county of Waseca. Wm. H. Latham et al. against Ashbel H. Barney et al. Bond for removal of case to U. S. C. court. Filed March 20th, 1877. Jas. Hayden, clerk.

109 *Order transferring case to U. S. C. court.*

District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca:

WILLIAM H. LATHAM AND EDWARD P. LATHAM
vs.
ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and the Winona and St. Peter Land Company.

On reading the petition and bond of the defendants, except the W. & St. P. Land Company, for the removal of this cause into the circuit court of the United States,

Ordered that said petition should be and the same are hereby accepted, and that this court proceed no further in said suit.

SAMUEL LORD,
Judge.

Filed April 6th, 1877.

JAS. HAYDEN,
Clerk.

(Indorsed:) District court, Waseca County. Latham et al. vs. A. H. Barney et al. Order transferring case to U. S. C. court. Filed April 6th, 1877. James Hayden, clerk.

110 District court, fifth judicial district.

STATE OF MINNESOTA,
County of Waseca, ss:

I, James Hayden, clerk of the district court of said county of Waseca, State of Minnesota (fifth judicial district), do hereby certify that I have carefully compared the foregoing copies with the original affidavit for attachment, bond in attachment, affidavit for publication of summons, and return of the officers thereon, printer's affidavit of the publication of summons, complaint and verification, with Exhibits A & B, schedule A, B, C, and D, answer of the defendant Ashbel H. Barney, answer of the defendants Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney, and The Winona and St. Peter Land Company, petition for removal to U. S. C. court, bond and order of this court transferring case to U. S. C. court, with the date of filing of each of said papers in the action therein entitled, and that each is a true and correct transcript therefrom and of the whole thereof, as the same appears from the files of this office.

Witness my hand and seal of the district court at Waseca, this 1st day of June, A. D. 1877.

[SEAL.] JAMES HAYDEN, *Clerk.*

(Indorsed:) United States circuit court, district of Minnesota. Wm. H. Latham et al. vs. Ashbel H. Barney et al. Return from district court, Waseca County. Filed June 8th, 1877. H. E. Mann, clerk. M. D. L. Collester, pl'ffs' sol's. G. E. Cole, of counsel.

111 United States circuit court for the district of Minnesota. Term minutes, June term, 1877. June 18th, 1877.

WILLIAM H. LATHAM
vs.
ASHBEL H. BARNEY ET AL.

And now come the plaintiffs and give notice of a motion to remand this cause to the State court.

112 United States circuit court for the district of Minnesota. Term minutes, June term, 1877. August 20th, 1877.

WILLIAM H. LATHAM ET AL.
vs.
ASHBEL H. BARNEY ET AL.

The motion of the plaintiff to remand this cause to the district court of Waseca County, from which it was removed, coming on to be heard, was argued by Gordon C. Cole, Esq., for the motion, and by Thomas Wilson, Esq., against the same, and submitted, and by the court taken under advisement.

113 United States circuit court for the district of Minnesota. Term minutes, June term, 1877. August 24th, 1877.

WILLIAM H. LATHAM AND EDWARD P. Latham
vs.
ASHBEL H. BARNEY, JESSE HOYT, ANGUS Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and The Winona & Saint Peter Land Company.

The plaintiff in this case having made a motion to remand this cause to the State court from which it was removed, which motion, after having been argued by counsel, was submitted to the court and held under advisement: Now, the court being fully advised in the premises, it is ordered that the said motion be and the same is hereby granted, and that the cause be and it is hereby remanded to the State court from which the same was removed, to wit, to the district court for Waseca County, Minnesota.

114 U. S. circuit court, Aug. 24, 1877.

WILLIAM H. LATHAM AND EDWARD P. Latham,
vs.
ASHBEL H. BARNEY ET AL.

The plaintiffs, one a citizen of the State of Minnesota, and the other a citizen of the State of Indiana, sued the defendants in the district court of the county of Waseca, in the State of Minnesota.

All the defendants, except the Winona and St. Peter Land Company, a corporation created by the legislature of Minnesota, being citizens of a different State from either of the plaintiffs, joined in a petition to that court for a removal of the suit into the Federal court, stating that they desired to remove the same, before the trial thereof, in pursuance of the provisions of law as contained in the act of Congress approved March 3, 1875, and that in this suit the controversy is, and the issues are, wholly between the plaintiffs and these petitioners, and that the Winona and St. Peter Land Company is not a necessary party to or in the trial or determination of the controversy or issues, or any of them.

The district court of Waseca County approved the bond ten-
115 dered, and entered an order that it proceed no further.

The suit has been properly docketed in the United States circuit court for the district of Minnesota, and a motion is now made to remand, for the reason that it has been improperly removed.

NELSON, J.:

The removal is claimed under the act of Congress approved March 3, 1875. If the defendant The Winona and St. Peter Land Company is a necessary party to the controversy, the motion to remand must prevail, for there would not be a controversy wholly between citizens of different States, and the removal is not asked by all the defendants, so that a solution of the question depends upon whether this defendant is such necessary party.

The plaintiffs charge in their complaint that the defendants who have

petitioned for this removal have defrauded them, and also withheld, wrongfully, their money, and have conveyed or authorized to be conveyed a large amount of real property in which they claim an interest to the defendant, The Winona and St. Peter Land Company, which corporation, with full knowledge of the fraud, and of all the facts in
116 regard to the plaintiff's claim, accepted the property, and are selling the same, and refuses to recognize their rights.

In the prayer for relief they ask that this company account to them for their interest in the proceeds of land sold, and also that it be decreed to convey to them the interest claimed in the lands unsold. Surely, then, it is not a formal, but an indispensable adverse party to the controversy, and this relief can only be granted by making it a party to the suit.

The counsel, to sustain the removal, lays stress upon the answer of the land company, which alleges "that it is unwilling to contend with the plaintiffs in this action, and if the matters at issue between them and its co defendants are decided in favor of the former, it consents that the matters and facts established and proven against its co-defendants may and shall be considered as established and proven against it, and that judgment may be entered accordingly," &c. It is urged that this contingent admission of liability has eliminated the land company from any controversy with plaintiffs, and the suit therefore has been properly removed. I am not now required to decide upon the effect of this
117 answer as a pleading. If the right to a removal of the suit existed at all, it depended upon the condition of the alleged controversy as it appeared when the complaint was filed, and is not controlled by the answer.

The plaintiffs have set up a substantial claim against this defendant, and it was a matter of no consequence, and the right of removal did not rest upon the fact whether it accepted or declined the issue tendered.

Motion to remand is granted.

(Indorsed:) U. S. circuit court, dist. of Minnesota. Wm. H. Latham et al. vs. Ashbel H. Barney et al. Opinion of court on motion to remand. Filed Aug. 24, 1877. H. E. Mann, clerk.

118 Supreme Court of the United States.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney, and the Winona and St. Peter Land Company, appellants,
vs
WILLIAM H. LATHAM AND EDWARD P. Latham, appellees.

To the honorable the Supreme Court of the United States:

The appeal of Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, and Charles F. Barney, and The Winona and Saint Peter Land Company, appellants, respectfully showeth:

That upon the 11th day of December, 1876, the above-named appellees filed their bill of complaint in this action, wherein said appellees are plaintiffs and these appellants are defendants, and began the same in

the State court, to wit, in the district court in and for the county of Waseca, in the State of Minnesota, against all the appellants above named, averring in said bill of complaint that said above-named
119 The Winona and St. Peter Land Company is a corporation duly incorporated under the laws of the State of Minnesota; and further setting forth in substance and at great length the certain provisions of statutory law concerning the making of a grant of lands in alternate sections to aid in the construction of certain railroads in said State of Minnesota, and particularly a railroad from Winona via St. Peter to a point on the Big Sioux River south of the forty-fifth parallel of north latitude, which provisions are contained in the act of Congress approved March 3d, 1857, entitled "An act making a grant of lands in the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State," and certain acts of Congress amendatory of and supplementary thereto, and certain acts of the legislature of the State of Minnesota, executing the trust created by such acts of Congress, all of which acts and provisions are fully set forth in said bill of complaint, to which these petitioners, appellants, beg leave to refer as part of this petition, by which enactments such grant of lands became and was transferred to the Winona and St. Peter Railroad Company, a corporation organized under the laws of said State of Minnesota, and authorized to construct, equip, and operate said line of railroad; and further alleging that prior to October 31st, 1867, one hundred and five miles of said line of railroad from Winona westerly to Waseca, in said State of Minnesota, had been constructed in accordance with and in fulfilment of all the afore-
120 said provisions of statutory law by said Ashbel H. Barney, Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Samuel N. Hoyt, and Alfred M. Hoyt, defendants and appellants herein; and Charles F. Latham and Danford N. Barney for the said The Winona and St. Peter Railroad Company, under a contract between them and said company, by virtue of which contract it is alleged said The Winona and St. Peter Railroad Company became and was entitled under said legislation to from six hundred thousand acres to six hundred and seventy-two thousand acres of land; that on said October 31st, 1867, a certain contract in writing was entered into by said parties above named so constructing said one hundred and five miles of said road of the first part, and said The Winona and St. Peter Railroad Company of the second part, by which among other provisions said railroad company agreed for certain considerations, and on certain conditions expressed, to sell and convey to said parties of the first part as many acres of land theretofore granted by Congress to the State of Minnesota as said railroad companies should receive from said State by reason of the construction of said one hundred and five miles of said railroad with certain reservations of lands for railroad purposes, a more full and explicit statement of the provisions of which contract is set forth in said bill of complaint, to which these petitioners appellants beg leave again to refer as part of this petition; and it is further aver'ed in said bill
121 of complaint that of the consideration for such agreed sale and conveyance of such land by said railroad company to said other parties to said contract, said Charles F. Latham contributed and advanced a one-thirty seventh part, by reason of which he, said Charles F. Latham, became and was in equity the owner of one-thirty-seventh interest in said contract, and entitled to one-thirty-seventh part of said lands.

That of said lands said railroad company, after making said contract, obtained and acquired title to and held in trust under said contract six hundred and seventeen thousand five hundred and ten acres, a particular description of which lands is set out in a schedule marked Schedule A, and attached to said bill of complaint; that about twenty-six thousand acres of said lands have been sold by said railroad company to various purchasers in small quantities for actual settlement, a schedule of which lands is also attached to said bill of complaint, marked Schedule B, at an average price of at least seven dollars per acre.

That in October, 1870, said Charles F. Latham died in the possession of the aforesaid interest in said contract and said lands, and leaving this' plaintiffs (appellees herein) and Henry M. Latham, James K. L. Latham, Lucy Kelly, Mary Baker, Julia A. Murphy, Sarah A. Stockwell, A. Zuba, F. Barney, and three children of Arthur Latham, deceased, his only heirs-at-law, each of whom by law inherited one-ninth of all said property interest, and that all said other heirs-at-law of said Chas.
122 F. Latham, deceased, save only these plaintiffs (appellees), have released and transferred their shares and interests in said contract and land to these appellants other than said The Winona and St. Peter Land Company.

That said D. N. Barney has also since died, and that to his rights in the premises the defendant, said N. C. Barney, has succeeded. That the defendant, Ashbel H. Barney, has always, as the agent of the other associates, conducted the business under said contract, received and distributed moneys accruing thereunder, and that at the death of said Charles F. Latham said Ashbel H. Barney held in his hands certain assets of said Charles F., and that the heirs of the latter having agreed among themselves to make an amicable division and distribution among themselves of the estate of said Charles F., deceased, said Ashbel H. surrendered to said heirs such assets in his hands, and the same were distributed between them pursuant to such agreement of distribution.

That afterwards an instrument in writing was executed by said Ashbel H. Barney and all said heirs inclusive of the plaintiffs (said appellees), which it is alleged was prepared by said Ashbel H. Barney, reciting said distribution and said surrender and distribution of such assets so in the hands of said Ashbel H., and containing mutual releases of all claims on account of said estate and a release of said Ashbel H. Barney from all claims on account of such assets so surrendered by him,
123 and setting out by schedule all the property and estate so distributed, and what is claimed to be a copy of said instrument and schedule of property distributed is attached to said bill of complaint, marked Exhibit B, to which these petitioners ask leave to refer.

Said bill of complaint further charges that said Ashbel H. Barney procured and induced the plaintiffs (appellees) to execute said instrument by fraudulent concealments as to the real value of the interest of said Charles F. in said contract with said The Winona and St. Peter Railroad Company and in said lands, and of the situation and condition thereof. And further charges that by said instrument the said interest of said plaintiffs as such heirs in said lands and their proceeds was not intended by them to be and was not in fact released, relinquished, or disposed of, but that these defendants (appellants, save said The Winona and St. Peter Land Company) are fraudulently, and it is aver'ed without right, claiming and insisting that plaintiffs have become and are by said instrument divested of all such interest and excluded from all participation of benefit under said contract and all interest in said lands and their proceeds.

It is further alleged that of the proceeds of such lands already sold since the death of said Charles F., and such division and distribution among his said heirs, and received by these defendants, appellants, the plaintiffs are entitled to three thousand five hundred dollars,
124 which they have demanded and which has been refused them. That at least five hundred thousand acres or said lands still remain unsold, which are worth on the average ten dollars per acre.

It is further charged in said bill of complaint that in 1876 these defendants, appellants, without the knowledge or consent of plaintiffs and without admitting them or either of them as corporators, did become incorporated under the laws of the State of Minnesota under the corporate name of "The Winona and St. Peter Land Company," for the purpose of receiving, holding, and disposing of said lands, which corporation is the defendant (appellant) herein of that name, and that upon such organization by the direction of these defendants, appellants, other than said land company, given under and pursuant to said contract with the said The Winona and St. Peter Railroad Company, the said railroad company did by deed convey all said lands so remaining unsold to said The Winona and St. Peter Land Company, which now hold the title to the same, but in trust for all parties beneficially interested; and that it took and holds said lands with full notice of all plaintiffs' right and without any consideration paid therefor. And the complainants pray for an accounting of all lands sold and of their proceeds, and for judgment against these defendants, appellants, for said sum of three thousand five hundred dollars, or such sum as shall be found due them in money, and for an accounting and division of all proceeds of
125 lands sold by said railroad company in defendants' hands and of lands sold by said land company, and that said company be required to convey to plaintiffs an undivided two-ninths of one-thirty-seventh of all such lands remaining unsold, and for such other or further relief as the court shall deem just.

To this bill of complaint said defendant, The Winona and St. Peter Land Company, answered separately, admitting its organization and incorporation as in the complaint stated, the conveyance to it by The Winona and St. Peter Railroad Company of certain lands without consideration, that the other defendants herein own all of its stock and that it holds and disposes of the same only for the benefit of the owners of such stock; that as to all the other allegations of the complainant it has no knowledge or information sufficient to form a belief, and fully admitting that if the relief prayed for in the complaint against the other defendants is granted it is liable to and should and will account with the plaintiffs, and alleging that it is not willing to contend with the plaintiffs, and that if the matters and facts at issue herein between the plaintiffs and the other defendant herein shall be decided in favor of the plaintiffs, it consents that all such matters and facts shall also be taken and considered as established as proven against it, and that
126 judgment may be entered accordingly, which separate answer is part of the record herein; and these petitioners beg leave to refer to the same as part of this petition.

The defendant, Ashbel H. Barney, also answered separately to said bill of complaint, setting forth at great length certain matters of legislation and certain proceedings and transactions in relation to the subject of this suit, and the matters in said bill of complaint set out, whereby the plaintiffs are estopped and precluded from claiming any part of the relief prayed for in the said bill of complaint, and fully denying and traversing all the equities of said bill of complaint, which answer is part of

the record in this case, and these petitioners beg leave to refer to the same as part of this petition.

The other defendants, appellants herein, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney, likewise answered together separately the said bill of complaint, fully denying all the equities of said bill, and setting forth at great length certain matters of defence whereby it is claimed plaintiffs should be held, and in law and equity are estopped and precluded, from claiming any part of the relief prayed for in said bill of complaint, which answer is also a part of the record herein, and to the same these petitioners beg leave to refer as part of this petition.

127 This appeal and petition further showeth that immediately after so answering said bill of complaint, and before any term of said State court at which said cause could be first or at all tried, and before trial thereof, to wit, on the 20th day of March, 1877, all of the aforesaid defendants (appellants herein) except said The Winona and St. Peter Land Company duly made and filed in said State court their petition herein for the removal of this suit into the circuit court of the United States for the district of Minnesota, wherein said suit was pending, setting forth in said petition that said Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, William G. Fargo, N. C. Barney, and Charles T. Barney, are and at the time of the commencement of this suit were, and that each of them were and are residents and citizens of the State of New York. That said Angus Smith is and at the time of commencement of this action was a resident and citizen of the State of Wisconsin, and that said Benjamin P. Cheney is and at the time of commencement of this suit was a resident and citizen of the State of Massachusetts; that the plaintiff William H. Latham is and at the time of commencing this suit was a resident & citizen of the State of Indiana, and that the plaintiff Edward P. Latham is and at the time of the commencement of this suit was a resident & citizen of the State of Minnesota. That the

128 matter in dispute in this suit between the plaintiffs and the petitioners for removal, appellants, and between the plaintiffs and each of said petitioners, appellants, exceeds and did exceed, exclusive of costs, the sum or value of five hundred dollars. That in this suit the controversy is and was, and the issues are and were wholly between the plaintiffs and said petitioners for removal (appellants) and that the controversy in this suit and all the issues therein can and could be fully determined as between the plaintiffs and said petitioners for such removal, and that said defendant the Winona and St. Peter Land Company is not a necessary party to or in the trial or determination of the said controversy or issues or any of them, and that no trial was had and there had not been any term of said State court at which the suit could have been tried at all, and praying for a removal thereof before trial into the said circuit court of the United States for the district of Minnesota, which petition for removal is part of the records herein, and these appellants hereby refer to the same as part of this petition. That they also made and filed in said State court with said petition for removal on said 20th day of March, 1877, a bond with good and sufficient surety for their entering in said circuit court on the first day of its then next session, a copy of the

129 record in said suit, and for paying all costs that might be awarded by said circuit court, if it should hold that said suit was wrongfully or improperly removed thereto, which bond is on file and of record herein and to which appellants hereby refer as part of this petition. That thereupon said State court made and entered an order in said suit accept-

ing said petition and bond, and proceeded no further therein. And on the first day of the next session thereafter of said circuit court these appellants duly entered in said circuit court a duly certified copy of the record in said suit, properly certified by the clerk of said State court, whereby this suit was removed into and became a suit pending in said circuit court.

This petition and appeal further showeth that after such removal and at the general term of said circuit court begun on the third Monday in June, 1877, the plaintiffs herein made application to said circuit court for a final order and decree herein in said circuit court, remanding this suit to said State court from which it was so removed, on the ground that it does not really and substantially involve a controversy properly within the jurisdiction of said circuit court, which application was opposed by these appellants. And that on the 24th day of August,
130 1877, the said circuit court made, filed, and entered herein its final order and decree remanding this suit to the said State court from which it was removed as aforesaid.

Whereupon these appellants appeal from the whole of said order and decree of said circuit court of the United States, and respectfully pray that said order and decree of the said circuit court and the bill of complaint, answers, pleadings, petition for removal and proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said case and application to remand anew, and that the said order and decree of the said circuit court and every part thereof may be reversed, with costs, or such other decree made herein as to the said Supreme Court shall seem just.

Dated this 10th of October, A. D. 1877.

WILSON & TAYLOR,
Solicitors for Appellants.

The foregoing appeal is allowed, and, the proper bond having been given and approved, the same is hereby made a supersedeas.

Dated October 11th, 1877.

R. R. NELSON,
Judge Circuit Court.

(Indorsed:) United States Supreme Court. Ashbel H. Barney et als., appellants, vs. William H. Latham et al., appellees. Petition on appeal. Original.

The within appeal is allowed, and, the proper bond having been given and approved, the same is hereby made a supersedeas herein.

Dated October 11th, 1877.

R. R. NELSON,
Judge of Circuit Court.

Filed Oct. 16, 1877.

H. E. MANN, *Clerk.*

Wilson & Taylor, solicitors for appellants, Winona, Minn.

Due service of the within petition by delivery to me of a copy thereof and of a copy of the allocution & supersedeas endorsed thereon is admitted this 13th day of October, 1877.

GORDON E. COLE.
Solicitor of Appellees.

131 United States Supreme Court.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. Hoyt, Samuel N. Hoyt, Angus Smith, Wm. G. Fargo, Benjamin P. Cheney, N. C. Barney, Charles T. Barney, and the Winona & St. Peter Land Company, appellants,
vs.
WILLIAM H. LATHAM AND EDWARD P. Latham, appellees.

STATE OF MINNESOTA,
County of Ramsey, ss:

Chas. E. Otis, having been first duly sworn, on oath says that on the 16th day of October, A. D. 1877, having filed the appeal, citation, and bond, with the allocutor of allowance & supersedeas and proof of service thereof in this cause, with the clerk of the circuit court in and for the district of Minnesota, he left a copy of said appeal for said appellees in the clerk's office of the circuit court aforesaid.

CHAS. E. OTIS.

Subscribed & sworn to before me this 16th day of October, 1877.

H. E. MANN,
Clerk of the Circuit Court, District of Minnesota.

(Indorsed:) U. S. Supreme Court. A. H. Barney et al., appellants, v. Wm. H. Latham et al., appellees. Affidavit of service of appeal, &c. Filed October 16, 1877. H. E. Mann, clerk.

132 Supreme Court of the United States.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. E. Barney, and Charles T. Barney, and The Winona and St. Peter Land Company, appellants,
vs.
WILLIAM H. LATHAM AND EDWARD P. Latham, appellees,

Know all men by these presents that we, Henry W. Lamberton, Thomas Wilson, of the city and county of Winona, in the State of Minnesota, are held and firmly bound unto William H. Latham and Edward P. Latham, the appellees above named, in the sum of one thousand dollars, to be paid to the said William H. Latham and Edward P. Latham, their executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, dated this 10th day of October, A. D. 1877.

133 Whereas the above-named Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney and The Winona and St. Peter Land Company, appellants, have taken an appeal to the Supreme Court of the United States to reverse the order and decree made and rendered in the above entitled action by the circuit court of the United States for the district of Minnesota, remanding said action to the State court from which it was removed:

Now, therefore, the condition of the above obligation is such, that if the above-named Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles T. Barney and the Winona and St. Peter Land Company, appellants, shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Dated this 10th day of October, A. D. 1877.

HENRY W. LAMBERTON.
THOMAS WILSON.

Signed, sealed, & delivered in presence of—
ROBERT TAYLOR.
WM. A. ALLEN.

134 (Indorsed:) Supreme Court of the United States. Wm. H. Latham et al., appellants, vs. A. H. Barney et al., appellees. Bond on appeal, with supersedeas. Original. Filed October 16th, 1877. H. E. Mann, clerk.

The within bond & sureties are hereby approved as satisfactory & complete security, and the same and the appeal herein is hereby made a supersedeas in this cause.

Dated October 11, 1877.

R. R. NELSON,
Judge of Circuit Court.

Wilson & Taylor, solicitors for appellants.

Due service of the within bond and the allocution of approval & supersedeas endorsed thereon by delivery to me of copies thereof this 13th day of October, 1877.

GORDON E. COLE,
Solicitor for Appellees.

135 Supreme Court of the United States.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. Hoyt, Samuel N. Hoyt, Angus Smith, Wm. G. Fargo, Benjamin P. Cheney, N. C. Barney, and Charles F. Barney, and The Winona & St. Peter Land Company, appellants,
vs.
WILLAM H. LATHAM AND EDWARD P. LATHAM, appellees.

It is hereby stipulated in the above entitled action that the exhibits attached to the complaint shall not nor shall any of them be certified up to the Supreme Court of the U. S. (in the appeal from the order remanding this case to the State court for trial), and it is further stipulated that no objection or question shall be raised on account of the absence of such exhibits.

GORDON E. COLE,
Of Counsel for Pl'ffs.
THOMAS WILSON,
Att'y for Def'ts.

(Indorsed:) Supreme Court of the United States. Ashbel H. Barney et. al. vs. Wm. H. Latham et al. Stipulation as to exhibits attached to complaint. Filed Dec. 26, 1877. H. E. Mann, clerk. Thomas Wilson, att'y for defendants.

136 Supreme Court of the United States.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, SAMUEL N. HOYT, ANGUS SMITH, WM. G. FARGO, BENJAMIN P. CHENEY, N. C. BARNEY, CHARLES T. BARNEY, and THE WINONA & ST. PETER LAND COMPANY, appellants,
vs.
WILLIAM H. LATHAM AND EDWARD P. LATHAM, appellees.

STATE OF MINNESOTA,
County of Rice, ss:

Thomas S. Buckham having been first duly sworn, on oath says that on the 13th day of October, A. D. 1877, at the city of Faribault, in the county of Rice, in said State, he served a copy of the annexed citation in this cause upon Gordon E. Cole, esq., solicitor of the said appellees, by delivering said copy of the citation to said solicitor of said appellees personally, and that on the same day deponent also served personally upon said Gordon E. Cole, solicitor of said appellees, a copy of the bond on appeal herein, and of the allo*catur* and supersedeas en-
137 dorsed thereon, signed by the judge of the United States circuit court for the district of Minnesota, by delivering to him a copy thereof, and of said allo*catur* and supersedeas; and that on the same day deponent served upon said Gordon E. Cole, solicitor of said appellees, a copy of the petition on appeal in this cause, and of the allowance and supersedeas endorsed theron, signed by the judge of said court, by delivering to him personally such copy of said petition, allowance, and supersedeas.

THOMAS S. BUCKHAM.

Subscribed and sworn to before me this 13th day of October, A. D. 1877.

[SEAL.] E. E. STERLING,
Notary Public.

138 By the honorable Rensaeller R. Nelson, one of the judges of the circuit court of the United States for the district of Minnesota.

To William H. Latham and Edward P. Latham:

Whereas Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheeney, N. C. Barney, and Charles T. Barney, and The Winona and St. Peter Land Company, have lately appealed to the Supreme Court of the United States from an order and decree lately made and rendered in the circuit court of the United States for the district of Minnesota, in a certain suit wherein you are complainants, and said appellants and The Winona and St. Peter Land Company are defendants, made in favor of you, the said William H. Latham and Edward P. Latham, remanding said suit to the State court from which it was removed, and have filed the security re-

quired by law; you are therefore hereby cited to appear before the said supreme court, at the city of Washington, on the second Monday of October, A. D. 1878 next, to do and receive what may appertain to justice to be done in the premises.

139 Given under my hand at the city of St. Paul, in the district of Minnesota, in the eight' circuit, the 11th day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

R. R. NELSON,
Judge of Circuit Court.

(Indorsed:) A. Chan. 539. Supreme Court of the United States. A. H. Barney et al., appellants, W. H. Latham et al., appellees. Citation. Original.

Due service of the within citation by delivering to me of a copy thereof, is hereby admitted this 13th day of October, 1877.

GORDON E. COLE,
Solicitor for Appellees.

Filed October 16, 1877.

H. E. MANN,
Clerk.

Compared.

140 UNITED STATES OF AMERICA, *ss:*

Circuit court of the United States, district of Minnesota.

I, H. E. Mann, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing, consisting of 139 pages, numbered consecutively from No. 1 to No. 139, inclusive, is a true and complete transcript of the records, process, pleadings, orders, and all other proceedings in said cause, except such matters as are omitted pursuant to the stipulation herein, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and *and* third year.

[SEAL.] H. E. MANN,
Clerk.

(Indorsed:) United States circuit court, district of Minnesota. William H. Latham et al. vs. Ashbel H. Barney et al. Return to Supreme Court.

(Indorsement on cover:) No. 466. Ashbel H. Barney, Jesse Hoyt, A. M. Hoyt, S. N. Hoyt, Angus Smith et al., appellants, vs. William H. & Edward P. Latham. Minnesota C. C. U. S. Filed 9th September, 1878.

REC. 466—5

SUPREME COURT U.S.
FILED
DEC 27 1880
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

ASHBEL H. BARNEY, JESSE HOYT, A. M. HOYT, S. N. HOYT, ANGUS SMITH, ET AL., APPELLANTS,

vs.

WILLIAM H. AND EDWARD P. LATHAM, RESPONDENTS.

APPELLANTS' POINTS.

THOMAS WILSON,

Solicitor and of Counsel for Appellants.

SUPREME COURT, U. S.

A. H. BARNEY, ET AL., APPELLANTS,

versus

WILLIAM H. LATHAM, ET AL., RESPONDENTS.

STATEMENT OF THE CASE.

The respondents in this court were plaintiffs in the lower court.

One of respondents (William H. Latham) is a resident and citizen of the State of Ohio, the other (Edward P. Latham) a resident and citizen of the State of Minnesota.

The Winona & St. Peter Land Company, one of the appellants is a Minnesota corporation. None of the other appellants reside in, or is a citizen of either Ohio or Minnesota.

The following is for the purpose of presenting the only question in this case: A sufficiently accurate statement of the facts alleged in the bill as the ground of the respondents' claim or right of action.

It is alleged that the respondents are two of nine heirs of Charles F. Lathman who departed this life in October A. D. 1870 and who in his life time jointly with Danford N. Barney (since deceased) and the following named appellants, Ashbel H. Barney; Jessie Hoyt, Angus Smith, William G. Fargo and Benjamin, P. Cheney was the owner at least of the equitable title to about 600,000 acres of land in the State of Minnesota:—the said Charles F. Latham owning one undivided thirty ninth part thereof.

Said Danford N. Barney before the commencement of this action departed this life in the State of New York and the appellant N. C. Barney his son succeeded to the interest of his father in said lands.

That the appellant Ashbel H. Barney fraudulently obtained an assignment or transfer of the estate or interest of the Latham heirs in and to the said lands for himself and the other appellants (except the Winona & St. Peter Land Co.) who claim and hold the same as against the respondents.

That in the Spring of 1876, the appellants except the Winona & St. Peter Land Co. "*incorporated themselves under the general law of the State of Minnesota for the purpose of enabling them the more conveniently to hold and convey said lands under the name and style of the Winona & St. Peter Land Co. which is the Defendant of that name.*"

(See Record pages 13 and 14 Fol. 35)

That after the act of incorporation aforesaid the said lands were conveyed to the appellant the Winona and St. Peter Land Co.

"That since the formation of the said Company the defendant Ashbel H. Barney has continued to be the active business manager of their affairs and during all the said time has been president of the said defendant corporation * * That since the said incorporation the plaintiffs have repeatedly applied to its said president for a transfer of their interest in said property and have always been put off by him by specious and frivolous excuses or their demands have been met by him by offers of different interests from those to which they were entitled by law coupled with various burdens and accompained by untrue and exagerated statements as to the small value of the lands and the great expense and risk attending the management of the grant."

"The defendant corporation took whatever interest they hold in trust for these plaintiffs to the extent of their interest as aforesaid and with full notice of their rights in the premises and without any consideration paid therefor."

That the Winona and St. Peter Land Co. has since its organization sold certain of said lands receiving part of the consideration in cash and part in time securities.

The respondents pray for relief among other things, as follows:—

That the alleged assignment or transfer of the interest or estate of the respondents (*two of the Latham heirs*) in and to said lands to Ashbel H. Barney and his associates be decreed to be fraudulent, null and void and set aside;—and that the respondents may be adjudged the owners of 2-9 of 1-37 part of all said lands and of the unpaid contracts and securities held for purchase money of lands sold and

"that the Winona & St. Peter Land Company be adjudged to account with the plaintiffs for all lands sold by them and to pay over to the plaintiffs the values thereof and that the Company be directed to convey to these plaintiffs" &c.

To this bill of complaint the appellants answered:—Ashbel

H. Barney and the Winona & St. Peter Land Company each answering separately and the other appellants jointly.

All of the appellants, except the Winona & St.Peter Land Company, answering, allege that the said assignment and transfer to them of the interest and estate of the Latham heirs in said lands was made fairly and in good faith, and for a valuable consideration, and is valid and they specifically deny fraud or misrepresentation on their part or on part of Ashbel H. Barney in the procurement of the said assignment or transfer.

The Winona & St. Peter Land Campany *admits that the lands were conveyed to it without consideration* and that it holds and disposes of them and of the proceeds of the sales for its stockholders (the other defendants and the heirs of said Danford N. Barney, deceased) and that——

"if the relief prayed for in the complaint against the other defendants is granted that it is liable to and should and will account to the plaintiffs as prayed for in the complaint.

It also alleges that it is unwilling to contend with the plaintiffs in this action and that if the matters at issue herein between the plaintiffs and its co-defendants are decided in favor of the former it consents that the matter and facts established and proven against its co-defendants may and shall be considered as established as against it and that judgment may be entered accordingly and that the plaintiffs in that event may have such judgment against it as to the court may seem equitable and proper."

Record pages 36 *and* 37.

After the answers were filed the appellants, except the Winona & St. Peter Land Company, filed their petition in the State court praying a remand of the suit to the U. S. Circuit Court which was ordered. Thereafter, on motion of respondents the U. S. Circuit Court made an order remanding the suit to the State Court on the ground that there was a common State citizenship between one of the respondents and the Winona & St. Pe-

ter Land Company, one of the appellants, which the court held ousted the jurisdiction of the U. S. Courts. See Record pages 43, 44.

From this order all the plaintiffs appealed to this Court.

ERROR ASSIGNED.

The single error assigned is, the making of the order remanding the case to the State Court.

POINTS OF APPELLANTS.

The Court below in rendering its decision remanding the suit used the following language:—

"If the Winona & St. Peter Land Company is a necessary party to the controversy the motion to remand must prevail for there would not be a controversy wholly between citizens of different States. * * * * *

The plaintiffs charge in their complaint that the defendants who petitioned for this removal (all the appellants but the Winona & St. Peter Land Company) have defrauded them and also withheld wrongfully their money and have conveyed or authorized to be conveyed a large amount of real property, in which they claim an interest, to the defendant the Winona & St. Peter Land Company, which corporation, with full knowledge of the fraud and of all the facts in regard to the plaintiffs' claim, accepted the property, and are selling the same, and refuses to recognize their rights.

In their prayer for relief they ask that this Company account to them for their interest in the proceeds of land sold and also that it be decreed to convey to them their interest claimed in the lands unsold.

Surely, then, it is not a formal but an indispensable adverse party to the controversy and this relief can only be granted by making it a party to the suit. * * *

The counsel to sustain the removal lays great stress upon the answer of the Land Company. * *

If the right to a removal of the suit existed at all, it depended upon the condition of the alleged controversy as it appeared when the complaint was filed and is not controlled by the answer. The plaintiffs have not set up a substantial claim against this defendant and it was a matter of no consequence and the right of removal did not rest upon the fact whether it accepted or declined the issue tendered."

The learned Judge who remanded the suit seems to entertain the view that if a complaint shows each of the defendants in a suit to be a necessary party thereto in order that the plaintiffs may have the full means of relief prayed for, a removal is not allowable *in any case* when there is a common State citizenship between any one of the complainants and any one of the defendants. With the greatest deference and respect for the opinion of the learned Judge we insist that this is not a proper construction of the constitution and Statutes of the United States touching the removal of causes.

This decision assumes that in the constitution of the United States and in the removal act of 1875, the word "controversy" is synonymous with "suit" or "case," and it also assumes that the word "*exclusively*" shall be understood as interpolated so that the right of removal shall exist only in cases or suits *exclusively* between citizens of different States.

Art. III, Sec. 2 of the Constitution reads:—

"The judicial power shall extend to all *cases* in law or equity arising under the Constitution &c; to all *cases* effecting ambassadors, &c., to all *cases* of admirallty and maritime jurisdiction;

to *controversies* to which the United States shall be a party; to *controversies* between two or more States; * * between citizens of different States," &c.

The removal act of 1875, clearly goes to the very verge of the constitutional grant of federal judicial power. The first clause provides

"That any suit of a civil nature at law or in equity now pending or hereafter brought in any State Court when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars * * *and in which there shall be a controversy* between citizens of different States, &c., either party may remove said suit," &c.

The second clause ~~second~~ provides——

"And when *in any suit* mentioned in this section *there shall be a controversy* which is wholly between citizens of different States and which can be fully determined as between them, then *either one or more of the plaintiffs or defendants actually interested in said controversy* may remove said suit" &c.

We think it is apparent that the words "*suit*" and "*controversy*" were not understood to be and are not synonymous and that the word "*exclusively*" is not understood.

It will be observed that the second clause of the act of 1875 does not require the "*suit*" to be wholly between citizens of different States but that only the "*controversy*" of the suit—the litigation—should be so.

There may be, as in this case, necessary parties to the suit

who are not parties to its controversy and the court to give full relief to the litigants may have to act on parties having no interest in the controversy.

Certainly the spirit of the constitution and statute allows a removal when the real *controversy* or *litigation* is between citizens of different States. To hold that the federal courts are ousted of jurisdiction by the mere fact of common state citizenship between some of the plaintiffs and some of the defendants who may be proper or even necessary parties to the *suit* but who are not interested in or parties to the "*controversy*" would be sacrificing substance to sound or shadow.

The purpose of the constitution and acts of Congress providing for the removal of actions was to provide an impartial tribunal for their *trial.* And when the questions *to be tried* are wholly between citizens of different States the spirit and reason of the law as well as its letter would seem clearly to justify a removal.

The rule in such cases is, we think, thus properly stated by Judge Dillon:—

"If the real litigation is between citizens of different States the case is within the constitutional grant of federal judicial power notwithstanding some of the adversary parties may happen to be citizens of the same State with some of the plaintiffs."—*Dillon on Removal of Causes pages* 30, 34, 35 *and notes.*

This is as far as it is necessary for appellants to ask the court to go in this case; for in this suit the *only question to be litigated—the only controversy*—is whether the transfer or assignment of the interest of the Latham heirs in the lands in Minnesota was obtained by Ashbel H. Barney and his associates by fraud.

If the question is answered in the affirmative the respondents are, *as a matter of course*, entitled to all the relief prayed for;—if answered in the negative, to no relief.

To this controversy the Minnesota corporation is not a party. It is specifically alleged by the complainants and expressly admitted that the Minnesota corporation took the lands in question without consideration *and holds and disposes of them for the other appellants.* The allegation of the complaint as to that is that the other appellants "incorporated themselves under the general laws of the State *for the purpose of enabling them the more conveniently to hold and convey the said lands*" &c. The land company answers that it admits the lands in question were conveyed to it * * without any consideration and that it holds and disposes of the said lands for, and pays over the proceeds thereof to the said stockholders, See

Record Pages 36 *and* 37.

It also admits that if the relief prayed for in the complaint against the other defendants is granted that it is liable to and should and will account with the plaintiffs as prayed for in the complaint and that if the matters at issue between the plaintiff and its co-defendants the fairness of the transfer by the Latham heirs are decided in favor of the former that the matters and facts so established and proven against its co-defendants shall be considered as established and proven against it and that judgment may be entered accordingly, &c.

Record pages 36 *and* 37.

Thus it will be seen this Land Co. is the mere agent or

instrumentality used by its co-defendants for their convenience —having no interest whatever else in the subject matter of the litigation. And besides this the sole question in the case which is to be litigaated is whether the transfer of the said land was obtained by fraud, which question as we have shown is solely between the other appellants and the respondents. The Land Company has neither interest or right to participate in *th's controversy or litigation.*

The appellants counsel claim that the presence of such a party although a proper and necessary party to the suit does not within either the letter or spirit of the removal laws operate to prevent a removal on the petition of the real parties to the controversy and cites the following authorities in support of this position

Lockhart vs Horn 1 *Woods R* 634

Taylor vs Rockefeller 7 *Cent L J* 349

N O T & M R Co vs Mississippi 13 *Ch Legal News* 93

Sheldon vs Packet Co 1 *Fed Rep* 789, 12 *Ch Legal News* 220.

Township of Aroma vs Auditor &c. 12 *Ch Legal News* 203

Farmers Loan and Trust Co vs Pekin S R Co 12 *Ch Legal News* 65.

Osgood vs R R Co 6 *Bissell* 330.

Dillon on Removal of causes 30, 34–5 *and note.*

3 *Southern Law Rev* 227 *to* 253.

Stanbrough vs Griffin 9 *Cent L J* 197

THOMAS WILSON.

Solicitor and of Counsel for Appellants

OFFICE SUPREME COURT U.S.
FILED
JAN 8 1861
JAMES H. McKENNEY, Clerk.

Supreme Court of the U. S.

ASHBEL H. BARNEY, JESSE HOYT, A. M. HOYT, S. N. HOYT, ANGUS SMITH, ET. AL. Appellants,

against

WILLIAM H. AND EDWARD P. LATHAM.

RESPONDENT'S POINTS AND AUTHORITIES.

GORDON E. COLE,

Solicitor and of Counsel for Respondents.

Faribault Republican Print.

Supreme Court of the U. S.

ASHBEL H. BARNEY, JESSE HOYT, A. M. HOYT, S. N. HOYT, ANGUS SMITH, ET. AL. Appellants,

against

WILLIAM H. AND EDWARD P. LATHAM.

Respondent's Points and Authorities.

First—This suit is brought by William H. Latham, a citizen of Indiana, and E. P. Latham, a citizen of Minnesota, against Barney and the other natural persons defendants, citizens of states other than Indiana and Minnesota, and the Winona & St. Peter Land Company, a citizen of the State of Minnesota. The Minnesota corporation does not join in the petition for removal.

The bill alleges the organization by the other defendants of the defendant corporation of the corporation, and a conveyance to it of the property in controversy. That, prior to its conveyance to the corporation the natural persons defendant had obtained from the plaintiffs by fraud

their interest in the property in controversy, which is a valuable land grant in the State of Minnesota; that they sold a portion of the lands prior to the formation of and conveyance to the corporation defendant, and as to this, after praying that the transaction under which the natural persons defendant acquired the plaintiff's interest may be set aside for fraud, the bill prays that they may account for the proceeds of such lands as were sold by them prior to the conveyance to the corporation, the accounting for the inconsiderable portion of the lands as disposed of by the natural persons defendant intermediate their fraudulent procurement of plaintiff's interest and the conveyance to the defendant corporation, is all the relief sought against the natural persons on whose petition the suit was removed. The bill then proceeds to demand the main and principal relief against the corporation, that it may account for the proceeds of all lands sold since the conveyance to it, and may be compelled to convey to the plaintiffs their portion of the lands still remaining unsold. The bill charges that the defendant corporation took its conveyance with notice of the fraud theretofore perpetrated on plaintiffs by the natural persons defendant, and holds the same as a trustee for the plaintiffs.

Can the removal be sustained under either clause of the second section of the act of March 3d, 1875?

The constitution of the United States, *Section* 2, *Article* 3, declares, "That the judicial power shall extend to all cases in law or equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority." "to controversies between citizens of different States."

Unlike the State constitutions the Federal constitution is not a restriction upon otherwise inherent powers, but a grant of power by which nothing passes except that expressly granted and such incidental powers as are necessary to the exercise of those expressly conferred.

The rights of citizens of the State where the suit is brought as well as those of other States are to be protected, the former to a cheap and speedy trial in the vicinage of his residence, the other to the impartiality with which the federal tribunals are presumed unswayed by local prejudice to hold the scales of justice; when a case arises in which two controversies exist side by side between parties, citizens of the State in which the suit is brought, and between a citizen of that State and one of another State, which right must yield? It is evident that under a statute which provides as the act of 1875 does for the removal of the whole case, both cannot exist; the rights which the constitution intended to protect seem here to be *in equilibrio*, and the light sometimes afforded by the object sought to be accomplished here failing, we can only recur to the letter of the grant of power, remembering that what is not granted either expressly or by necessary implication does not exist. We find, on referring to the constitution, the jurisdiction of the federal tribunals "shall extend to controversies between citizens of different States." There it stops; it is not extended to controversies between citizens of the same State. The State court has jurisdiction of both. Now shall that tribunal which has jurisdiction of one controversy, by reason of that fact draw to it another of which it has no jurisdiction? or shall the cause remain in the forum which has jurisdiction of both? Can it be said that,

having jurisdiction of controversies of the one character, it must by necessary implication take jurisdiction of the other in a case where, unless it does, it is deprived of its proper jurisdiction of the controversy which it has the right to hear? A mere occasional and accidental necessity which does not uniformly or generally exist, but notwithstanding may arise in certain supposable cases, is not the basis upon which implied powers are builded. The power which is taken by implication because necessary to the enjoyment of one expressly granted, is such that without it the granted power cannot be fully and efficiently exercised. The language of Judge Sawyer in *Burke vs. Flood in the Circuit Court of the district of California*, 1st *Federal. Reporter, pages* 541-551, is very apposite. He says:

"I suppose the rights of citizens of California to have their controversies among themselves adjudicated in the state courts is as absolute and undefeasible as that of a citizen of Nevada to have his controversy with a citizen of California adjudicated in the national courts. Indeed, in the state courts the jurisdiction is general and universal, while that of the national courts is limited to the cases expressly provided for and specially pointed out, by the United States constitution and the laws of Congress made in pursuance thereof, and the case must be clearly brought within the national constitution and statutes or the national courts cannot assume jurisdiction."

Whatever may have been the doubts expressed upon the circuit in the early history of the litigation under the act of 1875 and which are shown in the cases cited by appellant's counsel, I think it may be considered as settled, or at least very nearly so, by the decisions of this court, that the constitutional jurisdiction is limited as above, and that under the first clause of section 2 of the act of March 3d, 1875, all the real plaintiffs must be citizens of one

state and all the real defendants citizens of another, the right existing, however, to disregard the arrangement of parties by the pleadings and to arrange them in accordance with their real interest. Thus: a party who is really interested on the side of the plaintiff, but who, declining to join in bringing the suit, has been made defendant, may be classed with the plaintiffs, and if, when so arranged, the controversy is actually between citizens of different states, a removal can be had, but not otherwise.

And the expressions of some of the judges of this court upon the circuit early in the litigation under this law, that if there is one controversy in the case between citizens of different states it will carry the case to the federal tribunals, although there may be many other controversies in the same case between citizens of the same state, have not received the approval of this court. Thus in *Ober vs. Gallager*, 3*d Otto*, 199-204, the court said: "If, however, an indispensable party was a citizenof the same state with the plaintiff, the jurisdiction would be defeated, because the controversy would not be between citizens of different States, and thus not within *the judicial power of the United States as defined by the constitution.*"

In the case of *Arapahoe County vs. Kansas Pacific Railway Company*, 4*th Dillon*, *pp.* 277-279-282, where Mr. Justice Miller adopted the rule, since upon full argument adopted and approved by this court, of arranging the real parties to the suit according to their respective interests and allowing the removal if, when so arranged, all the parties plaintiff were citizens of one state and all the parties defendant citizens of another, he said:

"The act was intended and was understood to

have been passed for the purpose of developing substantially all the judicial powers which the constitution conferred upon the government of the United States.

"The objection is that the Denver Pacific Railway and Telegraph Company, Sayer & Moffat, are citizens of the same State with the complainants in this action. This objection has, as before stated, always been considered decisive against the jurisdiction of this court; where the complainant and defendant are both citizens of the same state the court has no jurisdiction. It is further alleged in support of the objection to the jurisdiction of this court in this case, that the Denver Pacific Railroad Company and Sayer and Moffat each of them are *necessary* adverse parties to the complainants in this suit. The objection, if well taken, will require the suit to be remanded."

But this court in the removal cases, *Meyer vs. Construction Co.*, 10 *Otto*, *pp.* 457-468, we understand to have settled the question at least as to the first clause of the act and by implication the second. They say, quoting the language of the first clause,

"This we understand to mean that when the controversy about which a suit in a state court is brought is between citizens of one or more states on one side and citizens of other states on the other side, either party to the controversy may remove the suit to the circuit court without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of a removal the matter in dispute may be ascertained and the parties in the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different states from those on the other, the suit may be removed."

Now, in view of the fact of the repeated declarations of the members of this court upon the circuit and of the generally conceded proposition that the act of 1875, had exhausted the constitutional jurisdiction of the federal judiciary, and is as broad as the constitution, we are justified in concluding that this construction was necessary to save the act from constitutional condemnation.

In *Burke vs. Flood et. al.* in the circuit court of California, *cited ante*, Sawyer, judge, said, referring to the last named case, *see* 1*st Federal Reporter* 541,

"I regard it as settled by that court that to remove a cause under the 1st clause of sec. 2 of the act of 1875, it is necessary that all of the persons constituting the party on one side of the controversy must be citizens of different states from those on the other side but for the purposes of removal the parties may be transposed and arranged in their proper positions with reference to their interest in the controversy without regard to their formal position as plaintiffs or defendants on the record. This is the rule as I understand it laid down in the latter case, (the removal cases) upon mature deliberation, after a re-argument in which any attorney feeling an interest in the question, whether as counsel in the case or not, was allowed to participate as *amicus curiae*."

Prior to the decision of this court in the removal cases. Mr. Justice Swayne upon the circuit, sitting in the eastern district of Michigan, had given the same construction to the first paragraph of section 2 of the act of 1875, and as to the second, indicates very clearly the same construction, bringing the act within the constitutional powers of the government, viz: That while nominal parties may be disregarded and their presence will not oust the federal court of jurisdiction which is what is meant by the language, "A controversy which is wholly between citizens of different states and which can be fully determined between them, either one or more of the defendants actually interested in the controversy may remove." He says, in regard to the second clause: "It is sufficient to say that this controversy is not wholly between citizens of different states and cannot be fully determined as between the parties before the court; there are other contestants whose presence is indispensable. They

are not and it is believed cannot be present as parties in this litigation in the federal tribunal."

In *the matter of the estate of Fraser*, 10 *Chicago Legal News, page* 390.

In *Bailey vs. N. Y. Savings Bank, in the southern district of N. Y.*, 2 *Federal Reports* 14, Judge Blatchford held the same doctrine.

In *Giraday vs. Moore et al in the Circuit Court for the southern destrict of Georgia* 5 *Central Law Journal* 78, Mr Justice Bradley, after holding that under the first paragraph of section 2 of the act of 1875, a case might be removed by all the parties on either side if there was a controversy between citizens of different States, although there were other controversies in which other parties not interested in the question upon which the removal was had and who were all residents of the same State, (but which opinion has as we have seen not prevailed in this court) held in regard to the second paragraph of the section, "that the right of a part to remove under that clause exists, as I understand him, only where the controversy is wholly between citizens of different states.

He says: "If my construction is correct, it follows that the removal of the cause could not be had under the act unless Bessaman and Giraby, who were citizens of the same State with the plaintiff, are to be regarded as *merely nominal parties*. The real controversy in the suit is wholly betweent the complainants and Moore, citizens of different States."

It is clear from the language of section 2 that it was not the intention to permit a suit to be removed by a non-resident party into the Federal court without the consent of a resident party. In other words, that parties interested in controversies between citizens of different

States could not force parties to the suit resident of the same State to submit the cause to the determination of the Federal courts; it is only when the controversy is *wholly* between parties citizens of different States that this can be done, permitting a disregard of nominal parties only, as said by Sawyer, Judge, in *Burke vs. Flood, cited ante*:

"If a citizen of Nevada finds it for his interest to enter into such business relations with citizens of California that his rights cannot be separately determined, he does so at his own option; and while he enjoys the benefit of such relations, he also necessarily accepts the inconveniences incident to the relation, one of which is that when his rights are so intermingled with those of his associates that they cannot be separately finally determined, he may find it impracticable to appeal to the National courts because he cannot do so without violating the rights of other parties to litigate in the State courts, equally sacred, and therefore loses the privilege which he otherwise would have to litigate them in the National courts. If this be the result, it is in consequence of his own voluntary action, and he cannot expect Congress or the courts to strain their authority in devising ways or pretexts for relieving him from the embarrassments incident to the relations which he has himself voluntarily assumed."

The appellants' counsel cites the decision of this court in the *New Orleans Mobile and Texas Railroad Company vs. the State of Mississippi, October Term*, 1880, 13 *Chicago Legal News*, 93, holding that under the first clause of section 2 of article 3 of the Constitution the courts of the United States may take jurisdiction of the case, although other than Federal questions arise in it.

This is no doubt true, provided the main or principal question, or one of the main and principal questions upon the determination of which the case may turn, arises under the Constitution of the United States, and for the very good reason that Congress takes, under the Constitution,

not only the powers expressly granted, but those necessary to the exercise of those granted.

A case can hardly be conceived in which, mingled with the Federal question, would not arise some question of general law or of the construction of State statutes.

The case is very different as to controversies between citizens of different States. The holding that any question of law arising under the common law of the land or the construction of State statutes would defeat the Federal jurisdiction, would practically render the first clause of the section referred to a nullity, while controversies between citizens of different States often, although not always, exist without the presence of citizens of the same State. But even under the first clause the Federal question must be a principal one and not simply incidental to the main controversy. Thus in *Gold Washing and Water Company vs. Keyes*, 6 *Otto*, 199-203, it was held that a cause cannot be removed from a State court simply because in the progress of the litigation it may become necessary to give a construction to the Constitution and laws of the United States, the decision of the case must depend upon that construction.

Second.—But the counsel seems to feel the force of these positions, and confines his argument chiefly to the endeavor to show that the defendant, "The Winona & St. Peter Land Company" is not a necessary but a merely nominal

party, and has attempted to place it in that attitude by disclaiming any desire to contend with us, but averring that if the fraud is established against its predecessors in the ownership of the property in controversy it is willing to account. If that is established it is difficult to see how it could very well help it, provided we can get it before a tribunal competent to compel an accounting and conveyance.

But, it is to be noticed, that it does not admit the fraud but puts us to our proof and yet claims that there is no controversy between the plaintiffs and itself. The fact is, that the controversy as to the conveyance of the unsold lands, and an accounting for all those sold by it since it acquired title, is exclusively with it and not at all with the natural persons, non-resident defendants.

It has been often held by courts of equity that the presence of all parties interested in and to be benefitted by the accounting is necessary; *a fortiori*, it would seem that the presence of the party who is to be required to account, was rather important. I am unable to understand what that sort of a controversy in a judicial tribunal would resemble which was wholly detached from any measure of relief whatever. It would seem that in order to ascertain who were the indispenable parties to a bill in equity it would only be necessary to ascertain from whom the court was asked to enforce the relief sought for by the bill.

It is often said by courts in deciding that parties are not necessary, "that no relief is asked against them."

If any in this suit are nominal parties as to that portion of the controversy arising since the conveyance to the defendant corporation, it is the non-resident defendants.

No relief whatever is asked against them. We seek by reason of their fraud, of which we allege the defendant land company had notice, to compel a conveyance from the latter.

But the counsel for the appellant urges that the corporation is a mere trustee holding the legal title, and that the other defendants who seek the removal are mere "*cestuys que trust.*"

If this were technically accurate it would follow that the trustees, and not the *cestuys que trust*, were the necessary parties, as they represent the equitable owners.

The case of *Taylor vs. Rockfeller*, 18 *American Law Register* 298-309, *in the Western District of Pennsylvania*, cited by appellant, would be a complete answer. The court says:

"Conceding that these other defendants are *cestuys que trust*, they are not necessary parties to the bill. They are represented by their trustees."

But the natural persons defendant, are merely stockholders of the defendant corporation, and the latter is no more a trustee for them than a corporation is always a trustee for its stockholders. It is the corporation and not its stockholders who is a necessary party. See *Arapahoe county vs. Kansas Pacific R. R. Co.* 4 *Dillon* 277, where the corporation to be benefitted by an accounting sought by its own stockholders was held a necessary and indispensable party.

But the counsel sought to put his clients in a position where the removal could be had by disclaiming any desire to contend with the plaintiffs, and expressing a willingness to abide by the result of the trial as between tho other parties.

Suppose the other parties had appeared by other coun-

sel, and had filed the same answer expressing a willingness to abide by the trial between plaintiffs and defendant company, but neither admitting the charges of the complaint. We confess that this practice strikes us as rather of a novelty in pleading.

But precisely the same attempt was made in the case of *New Jersey Zinc Co. vs. Trotter, in the Circuit Court of the District of New Jersey*, 17 *American Law Register*, 376-381, and the court said, as Judge Nelson said in this case: "The other defendants have not joined with the petitioning defendant, but have answered in the State court disclaiming all interest in the controversey. Will such disclaimer bring the case within the last clause of the second section of the act of 1875, which authorizes a single plaintiff or defendant to petition for the removal when the controversy is wholly between citizens of different States, and can be fully determined between them?

We think not. We must decide on the case made by the bill of complaint, and not by the disclaimer of the defendants."

This is manifestly so; the jurisdiction of the court in such cases is *over the subject matter* by reason of the citizenship of the parties; consent cannot confer jurisdiction. They say, they will abide by the result, but suppose they don't. In order to prevent the jurisdiction of the court from degenerating into a mere farce, it must have power to enforce its decrees without regard to the consent of the defendants. If then any relief is claimed against the Winona and St. Peter land company, and, if they are residents of the same State with plaintiffs, or one of them, and if the constitution does not extend jurisdiction to such cases, no disclaimer or consent on the part of defendants, can confer it.

Third.—But in order to ascertain whether the defendant, the Winona and St. Peter land company, is a necessary party, it is only necessary to refer to the repeated decisions of this court, under the law as it existed prior to the passage of the act of 1875, because, although they might not throw any light upon the proper construction to be given to that act, yet, when we have once ascertained that the presence of necessary parties, defendant, resident of the same State with the plaintiff, will defeat the jurisdiction of the circuit court, these decisions are authorative upon the question, who are such necessary parties.

In *Kendig vs. Dean*, 7th *Otto* 423.

The suit was against Dean, a person having the control of the books and business of a gas company, who, it was alleged had disregarded the rights of the plaintiff, by fradulently procuring a transfer of the plaintiff's stock to him. The case is, in its facts, very analogous to the case at the bar. The court said, "Suppose the court had rendered a decree in the exact language asked for, and Dean should be attached for contempt, in refusing to perform it; he could answer very truly that he was not the corporation and had no control of its books and officers; that he had no means of compelling it to make a transfer of this or any other stock on its books, and that it was a corporation governed by its own officers, and was not bound by the decree of the court, and would not perform it. The court would find itself in the position of having made a decree it could not enforce, attempting to give a relief which was beyond its power, because the party whose action was necessary to that relief was not a party to the suit."

The holding of this court on the subject of parties has been summed up in various cases as follows:

"There is a class of persons who may or may not be made parties to the suit at the discretion of the court.

A second class who if their interest is brought to the attention of the court, it will, before deciding the cause, require them to be made parties, if within its jurisdiction, but who are not so necessary to the relief that their absence defeats the jurisdiction.

And there is a third class whose interests in the subject matter of the suit, and the relief sought, are so bound up with those of the other parties that their legal presence as parties to the proceedings is absolutely necessary, without which the court cannot proceed. In such cases the court refuses to entertain the suit when the parties cannot be subjected to its jurisdiction. The case before us, say the court, in *Kendig vs. Dean*, "comes plainly within the language here used.

The gas company is an indispensible party to the *relief* sought by the bill." See also

Shields vs. Barron, 17, *Howard* 130.

Barney vs. Baltimore City, 6, *Wallace* 280.

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